

D9OJBIN1

Trial

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 UNITED STATES OF AMERICA,

5 v.

12 Cr. 152 CM

6 MICHAEL BINDAY,
7 a/ka/ Sealed Defendant 1,
8 JAMES KEVIN KERGIL,
9 a/k/a Sealed Defendant 2,
10 and MARK RESNICK,
11 a/k/a Sealed Defendant 3,

12 Defendants.
13 -----x
14

15 Before:
16 HON. COLLEEN McMAHON,
17 District Judge
18 and a jury
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Trial

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APPEARANCES

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Southern District of New York

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ZACHARY FEINGOLD,

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Of counsel

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Trial

1 (Trial resumes)

2 (In open court; jury not present)

3 THE COURT: I apologize for having suppressed the fact
4 I was in the middle of a root canal.

5 MS. MURRAY: Your Honor, can I put something on the
6 record?

7 THE COURT: Yes.

8 MS. MURRAY: I was the only attorney in the courtroom
9 this morning with somebody from Connect, the Computer Connect
10 service and a juror walked in and looked at me and said, "Am I
11 too early?" And I said to her, "10:30."

12 THE COURT: Good answer!

13 MR. FELSENSTEIN: We have an application this morning.

14 THE COURT: Yes.

15 MR. FELSENSTEIN: Pursuant to Rule 403, we would like
16 to preclude testimony from Thomas Pernice. Pernice is the son
17 of the insured Mary Pernice. We have had testimony from three
18 insureds already. We are going to have a fourth today from
19 Steven Espinal.

20 THE COURT: What is it he is going to testify to that
21 his mother hasn't already testified to?

22 MR. FELSENSTEIN: His mother hasn't testified, your
23 Honor. They're only testifying to the fact there are lies on
24 the application, which we have conceded in our opening and
25 cross-examined witnesses on as well.

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1 THE COURT: I am not going to preclude the government
2 from putting on its case.

3 MR. FELSENSTEIN: Thank your Honor.

4 MS. McCALLUM: Your Honor, we have just one matter.

5 We would like, at the request and suggestion of the
6 Court Reporters, offer into evidence what has been marked as
7 Government Exhibit 6000.

8 THE COURT: Yes.

9 MS. McCALLUM: Which is the list of all the exhibits
10 we entered into evidence.

11 THE COURT: I knew the Court Reporters would come up
12 with a solution! I just knew it! It is in evidence.

13 MR. ABRAMOWITZ: No objection.

14 THE COURT: It is in evidence.

15 (Government Exhibit 6000 received in evidence)

16 MR. FEINGOLD: Would you like us to get the witness,
17 your Honor?

18 THE COURT: Let's get the witness.

19 (Recess)

20 THE COURT: Can we get the jurors, please.

21 THE CLERK: Yes.

22 (Jury present)

23 THE COURT: Good morning, everybody. I am really,
24 really sorry. I apologize. I had obviously suppressed the
25 fact I was in the middle of a root canal when we started the

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1 trial and that I had to finish it this morning. I forgot that
2 yesterday.

3 When I got back down to my office, there was, of
4 course, a message from the endodontist reminding me I had this
5 appointment. That is why I am late. It is my fault. I really
6 apologize. Sir, you're still under oath. I believe we're on
7 cross.

8 CROSS-EXAMINATION

9 BY MR. FISCHER:

10 Q. Good morning, Mr. Marcec. My name is Ben Fischer, and I
11 represent Michael Binday.

12 Mr. Marcec, you testified yesterday about
13 illustrations that you worked on while you were at R. Binday
14 Plans & Concepts, correct?

15 A. Yes.

16 Q. You worked on preparing and reviewing illustrations. Isn't
17 that right?

18 A. Yes.

19 Q. Illustrations contained certain estimates about certain
20 things related to a life insurance contract, correct?

21 A. Yes.

22 MR. FISCHER: Can I have the government show
23 Government Exhibit 536, please.

24 BY MR. FISCHER:

25 Q. I would like to specifically direct your attention to the

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Marcec - cross

1 page with the Bates number 293517. Mr. Marcec, just let me
2 know when you've gotten there. You might also be able to look
3 on your screen, too.

4 A. Yes, I have it.

5 Q. Do you see that?

6 A. Yes.

7 Q. Mr. Feingold was asking you some questions yesterday about
8 this chart in the middle of the page. Do you recall some of
9 those questions?

10 A. Yes.

11 Q. He was asking you about premium outlays, right?

12 A. Yes.

13 Q. And the fact that -- he asked you whether part of the first
14 year premium outlay would be paid as a commission to the
15 insurance broker. Do you remember that?

16 A. Yes.

17 Q. And then he said the second -- he discussed with you the
18 fact the second year premium, oftentimes the funders would be
19 looking for a low second year premium. Do you recall that?

20 A. Yes.

21 Q. I want to direct your attention to the premium outlays on
22 that chart between lines 3 and 20. Do you see those?

23 A. Yes.

24 Q. Is it fair to say that between lines 3 and 20, every
25 premium outlay is \$156,734,00. Do you see that?

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Marcec - cross

1 A. Yes.

2 Q. And that that number is bigger than the first year premium
3 outlay of \$149,300.00, correct?

4 A. Yes.

5 Q. It is also bigger than the second year premium outlay of
6 \$72,015.00, correct?

7 A. Yes.

8 Q. And is it fair to say that the premium outlay referenced in
9 line items 3 through 20 of that chart is money that if the
10 insurance policy stays in effect, is going to the life
11 insurance company, correct?

12 A. Yes.

13 Q. Now, you talked yesterday about how you had a role with
14 respect to funders and investors, right?

15 A. Yes.

16 Q. You had a role at R. Binday Plans & Concepts with respect
17 to funders and investors, correct?

18 A. Yes.

19 Q. Funders, funders were people who loaned money to make
20 premium payments, correct?

21 A. Yes.

22 Q. That was usually a two-year arrangement, correct?

23 A. Correct.

24 Q. And at the end of those two years, the money that the
25 funder loaned would be repaid, correct?

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Marcec - cross

1 A. Yes.

2 Q. If the policy was sold?

3 A. Yes.

4 Q. That's the funder.

5 Investor would be someone who would buy the policy,
6 correct?

7 A. Yes.

8 Q. The amount they paid for the policy would typically
9 reimburse the funder, correct?

10 A. Repeat that.

11 Q. The amount an investor paid for a policy, a portion of that
12 amount would reimburse the funder, the entity that loaned the
13 money, correct?

14 A. I am sorry. Say that again.

15 Q. Sure. The funder would be repaid through the sale of the
16 life insurance policy, correct?

17 A. Yes.

18 Q. And oftentimes, many times, not just the funder would get a
19 payment if there was a sale of a life insurance policy, the
20 insured, the person getting life insurance, would also get a
21 payment as well, correct?

22 A. Yes.

23 Q. And typically that payment could be -- withdrawn.

24 That payment could be upwards of a hundred thousand
25 dollars, correct?

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Marcec - cross

1 A. Yes.

2 Q. Now, the concept of the investors, the people who were
3 buying the life insurance policy, is that sometimes referred to
4 as a life settlement?

5 A. Yes.

6 Q. It's true, is it not, that life insurance policies have
7 cash value sometimes? They're worth something?

8 A. Yes.

9 Q. And they may be worth more -- withdrawn.

10 They have cash value. They're an asset, right?

11 A. Yes.

12 Q. Many times people -- withdrawn. People are free to buy or
13 sell assets, right?

14 A. Yes.

15 Q. Do you have an understanding that people are free to buy
16 and sell life insurance policies -- which are assets, correct?

17 A. Yes.

18 Q. It's true, is it not, that there is a multi-billion dollar
19 life insurance --

20 MR. FEINGOLD: Objection.

21 THE COURT: I don't know what he is going to say.

22 MR. FEINGOLD: Apologies.

23 THE COURT: You do. I don't. Ask the question.

24 MR. FISCHER: I'll start again.

25 BY MR. FISCHER:

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Marcec - cross

1 Q. It is true, is it not, Mr. Marcec, that there is a
2 multi-billion dollar life settlement market in the United
3 States, correct?

4 MR. FEINGOLD: Objection, your Honor.

5 THE COURT: Overruled.

6 A. Yes.

7 BY MR. FISCHER:

8 Q. It's true, is it not, that some of the largest insurance
9 companies in the world are active players in that life
10 settlement market. Isn't that correct?

11 MR. FEINGOLD: Objection, your Honor.

12 THE COURT: Overruled.

13 A. Yes.

14 BY MR. FISCHER:

15 Q. American General is a very active player in that market.
16 Isn't that right?

17 A. Yes.

18 Q. They buy and sell life insurance policies, don't they?

19 A. Yes.

20 Q. To the tune of billions of dollars, right?

21 A. Yes.

22 Q. Other life insurance companies do as well, correct?

23 A. I believe so.

24 Q. You testified yesterday on direct examination about
25 something called life expectancy reports. Do you remember that

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Marcec - cross

1 testimony generally?

2 A. Yes.

3 Q. Those were reports that sometimes you would get in
4 connection with providing a package to funders or investors,
5 right?

6 A. Yes.

7 Q. Do you have any knowledge of whether life insurance
8 companies also used life expectancy reports in determining, in
9 analyzing life insurance contracts?

10 A. Yes.

11 Q. They do, right?

12 It is a standard thing in the industry, correct?

13 A. Yes.

14 Q. You were also asked some questions generally yesterday
15 about life expectancy. Do you remember those?

16 A. Yes.

17 Q. And the companies would prepare life expectancy reports
18 generally. Do you remember that generally?

19 A. Yes.

20 Q. And that the life expectancy reports would come up with a
21 number. Mr. Feingold showed you how many months that life
22 expectancy report thought someone was going to live. Do you
23 remember that generally?

24 A. Yes.

25 Q. Mr. Marcec, nobody can determine how long someone is going

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Marcec - cross

1 to live, correct?

2 A. Correct.

3 Q. Nobody knows the exact day somebody is going to die,
4 correct?

5 A. Correct.

6 Q. Premiums that are received by life insurance companies, and
7 in this case -- withdrawn. The premiums that are received by
8 life insurance companies on the cases that you worked on would
9 be well over a hundred thousand dollars, correct?

10 A. Yes.

11 Q. Over \$150,000, correct?

12 A. Yes.

13 Q. Sometimes over \$200,000, correct?

14 A. Yes.

15 Q. And those were payments received by the insurance
16 companies, correct?

17 A. Yes.

18 Q. Now, isn't it true that the insurance companies, when they
19 receive those payments, they invest those payments?

20 A. Yes.

21 MR. FEINGOLD: Objection, your Honor.

22 THE COURT: The objection is sustained.

23 BY MR. FISCHER:

24 Q. Do you have any knowledge of whether insurance companies
25 that receive --

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Marcec - cross

1 THE COURT: There is no other way to ask the question.
2 The objection is sustained to the line.

3 MR. FISCHER: May I have a moment, your Honor?

4 THE COURT: Yes.

5 (Off-the-record discussion)

6 BY MR. FISCHER:

7 Q. Mr. Marcec, just going back to some questions I asked you a
8 few moments ago about a life insurance cash value. Do you
9 recall those?

10 A. Yes.

11 Q. Life insurance has cash value, correct?

12 A. Yes.

13 Q. And that means if you go to a life insurance company, at
14 some point they may give you some amount of cash in exchange
15 for you terminating that policy, correct?

16 A. Yes.

17 Q. They'll pay you, and they determine, the life insurance
18 company determines how much cash it is they'll give you?

19 A. Yes.

20 Q. Correct, and that is sometimes called a cash surrender,
21 right?

22 A. Yes.

23 Q. Isn't it true that the life settlement market often offers
24 people who have insurance more money for their life insurance
25 policy than what the life insurance company is offering on a

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Marcec - cross

1 surrender basis?

2 MR. FEINGOLD: Objection, your Honor; foundation.

3 THE COURT: The objection is sustained.

4 MR. FISCHER: Your Honor, he handled these
5 transactions. He worked, he brokered these transactions.

6 THE COURT: For the life insurance company? I don't
7 think so. That is fine. You will have people from the
8 insurance industry testifying.

9 MR. FISCHER: I have nothing further.

10 THE COURT: Anybody else?

11 MR. STAVIS: No, your Honor.

12 THE COURT: Ms. Murray?

13 MS. MURRAY: Your Honor, just a couple of questions.

14 THE COURT: Sure. Okay.

15 CROSS-EXAMINATION

16 BY MS. MURRAY:

17 Q. Good morning, Mr. Marcec.

18 You're not an actuary, are you?

19 A. No.

20 Q. The charts that you showed us yesterday of potential
21 returns from investments in life insurance policies, these
22 weren't prepared by actuaries, right?

23 A. I am sorry. Which charts?

24 Q. The charts, the graphs that were put up on the overhead
25 yesterday which would be sent out to hedge funds in connection

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Marcec - cross

1 with selling the life insurance policies and showing the
2 returns?

3 A. Illustrations?

4 Q. Yes.

5 A. Yes, they were not prepared by actuaries.

6 Q. They were not prepared using actuarial models, correct?

7 A. They were prepared using the software from the insurance
8 carriers.

9 Q. Do you know what went into that software --

10 A. No.

11 Q. -- mr. Marcec?

12 And these were essentially marketing materials to the
13 hedge funds, would that be fair to say, provided to the hedge
14 funds?

15 A. Yes.

16 MS. MURRAY: No further questions.

17 MR. FEINGOLD: No redirect, your Honor.

18 THE COURT: Thank you, sir. Sorry to bring you back
19 today.

20 (Witness excused)

21 THE COURT: Call your next witness.

22 MR. FEINGOLD: The government calls James Avery.

23 JAMES AVERY,

24 called as a witness by the Government,

25 having been duly sworn, testified as follows:

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Marcec - cross

1 DIRECT EXAMINATION

2 BY MR. FEINGOLD:

3 Q. Good morning, Mr. Avery.

4 A. Good morning.

5 Q. How old are you?

6 A. 61.

7 Q. Where do you live?

8 A. In Langhorne, Pennsylvania.

9 Q. Did you go to college?

10 A. I did.

11 Q. Where did you go to college?

12 A. La Salle University in Philadelphia.

13 Q. Did you graduate?

14 A. I did.

15 Q. What did you get your degree in?

16 A. BA in mathematics.

17 Q. When did you graduate?

18 A. 1973.

19 Q. What did you do after graduating college?

20 A. I joined the Penn Mutual Life Insurance Company of
21 Philadelphia as an actuarial intern.

22 Q. What is Penn Mutual?

23 A. Penn Mutual is a mutual life insurance company.

24 Q. What is an actuary?

25 A. An actuary is someone who is trained and specializes in the

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Avery - direct

1 measurement of risk. Usually you find them in insurance
2 companies or in pension plans, the organizations where they can
3 measure risk and finance and the probability of death or
4 probability of health impairments, and they determine premiums
5 and they determine reserves adequate to pay future claims.

6 Q. Is that really the pricing?

7 A. That is one of the functions they do is pricing, yes.

8 Q. Pricing of insurance policies?

9 A. Pricing of all types of insurance, yes.

10 Q. How long were you at Penn Mutual?

11 A. I spent 15 years with Penn Mutual.

12 Q. Where did you go after Penn Mutual?

13 A. I joined the Prudential Insurance Company of America.

14 Q. When was that?

15 A. In October of 1988.

16 Q. What were your different roles at Prudential?

17 A. I joined them serving in the capacity as a corporate
18 actuary on the finance side. I eventually wound up in
19 individual life insurance. At one point I wound up running a
20 distribution, independent distribution company that deals with
21 agents and brokers who are not employed directly by Prudential.

22 I was chief actuary and chief financial officer for
23 the individual life business. I eventually became president
24 and then in my last -- for 14 years I was president. The last
25 6 or 7 years I was CEO of both individual life and our agency

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Avery - direct

1 distribution organization. They were the agents who were
2 employed by Prudential and carried Prudential business cards.

3 Q. In around the time of, let's say, 2005 to 2008, what was
4 your position?

5 A. I think in 2005 I was probably president of the individual
6 life insurance business.

7 Q. Would that include universal life policies issued to
8 individuals?

9 A. All life insurance products issued in the United States.

10 Q. When did you become CEO of that business?

11 A. Probably about 6 or 7 years ago.

12 Q. Are you still at Prudential?

13 A. I retired April 1 of this year.

14 Q. Mr. Avery, are you familiar with the term STOLI?

15 A. I am.

16 Q. What is STOLI?

17 A. STOLI is an acronym which references many different ways of
18 referring to it, but primarily stranger initiated or stranger
19 owned life insurance, meaning that the owner or the person who
20 initiated the sale is a stranger to the insured and has no
21 insurable interest in the well-being of that insured.

22 Q. What is an insurable interest?

23 A. Insurable interest is codified by law. It means that the
24 owner and beneficiary of the policy has an interest in the life
25 of the insured that goes beyond the insurance, meaning they're

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Avery - direct

endeared by either relationship, marriage or familiar relationship or business relationship and that the person's well-being is more important to them than the insurance proceeds and that their relationship is not dependent strictly on being rewarded at death.

So if you have an insurable interest, meaning you have an interest beyond the insurance in that life. By law in most states, to buy insurance you have to have an insurable interest.

Q. Is an insurable interest something that Prudential looked at in deciding whether to issue universal life insurance policies?

A. We look at it to issue any life insurance policy.

Q. What are some of the characteristics that you associated with STOLI policies?

A. They're a number of characteristics. It was a market that began probably in 2004-2005. It involved some of the characteristics change.

First off, I would say the industry, as they began to understand it, at least my role, never wanted to issue a STOLI policy. As it evolved --

MR. ABRAMOWITZ: I object. Is he speaking for the entire industry or only his company?

THE WITNESS: I will change my answer.

THE COURT: You don't have to. You may sit down.

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Avery - direct

1 A. In my capacity not only at Prudential, but I also served on
2 the life insurance, American Council of Life Insurance
3 Committee. I had a role that was broader than just Prudential
4 in terms of legislative matters.

5 Anyway, going back, if you can repeat the question,
6 please?

7 Q. Sure. What are some of the characteristics that you
8 associated with STOLI policies? I think just if you move the
9 microphone a little closer to you, that would be great.

10 A. A number of characteristics. I would say first, typically
11 they were large policies, typically issued to senior citizens.

12 "Senior" is defined as probably age 65 or above.
13 Typically what we would find if we could do proper evaluation
14 and get the facts, we would find that the individual insureds a
15 lot of times didn't need the insurance, didn't want the
16 insurance. In a number of cases they couldn't afford the
17 insurance and someone arranged the financing, albeit a number
18 of times it was disguised to us. They arranged financing to
19 pay the premiums because the person being insured couldn't
20 afford it. Even if they could afford it, they didn't want to
21 buy the insurance.

22 A lot of times we saw they were given money to allow
23 the stranger to buy the insurance. We saw advertisements in
24 Florida such as free cruises, free dinners, all things to
25 induce senior citizens to allow someone who had no insurable

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Avery - direct

1 interest in that person to buy an insurance policy, generally a
2 large insurance policy on that life.

3 THE COURT: I need to tell you, see this nice man? He
4 can only type so fast. You talk like I talk; real fast.

5 THE WITNESS: I will try to slow it down.

6 THE COURT: Slow it down a little bit.

7 THE WITNESS: Thank you.

8 BY MR. FEINGOLD:

9 Q. What type of payment patterns, if any, did you associate
10 with STOLI?

11 A. Well, as I said, the first thing is that when we could
12 discover STOLI, we found that there was someone behind the
13 scenes other than the insured who was purporting to purchase
14 the policy, paying the premiums. They would typically be paid
15 with that loan for about two years, which there is a reason
16 behind the fact that generally insurance companies are limited
17 in contesting a claim after the first two years, except in a
18 lot of states for fraud.

19 So what we would find is there would be a loan in
20 place for two or three years to cover those initial premiums,
21 and then generally the policy then would be sold, if not
22 sooner, it would be sold and then the new investor-owner would
23 pay premiums from that point forward.

24 Q. We have been talking about STOLI. I think you testified
25 that there are other terms as well. Are you familiar with the

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Avery - direct

1 term STOLI?

2 A. Yes, that is the stranger originally life insurance, but
3 its is the same transaction or same marketing, market approach.

4 Q. The same question for IOLI, I O L I?

5 A. Again used for the same thing, the person initiated it, a
6 point of referencing there is an investor-owned life insurance,
7 but the same sort of marketing scheme where eventually the true
8 owner or beneficiary of the proceeds will not be the insured,
9 but will be someone who is unrelated to the insured, a
10 stranger.

11 Q. Just so we are on the same page, I used the term STOLI
12 today.

13 A. Okay.

14 Q. When is the first time you became aware of STOLI?

15 A. I think it was in the 2004-2005 time-frame. I was
16 approached by individuals who wanted to market this and thought
17 it would be good for Prudential to use their products to sell
18 through this marketing, a form of marketing to generate more
19 life insurance sales.

20 Q. What, if anything, did you do after learning that
21 Prudential was approached with this opportunity?

22 A. I tried to gather as much information so I could understand
23 it. Being an actuary, I understood pricing, I also understood
24 risk and quickly understood this was not the type of
25 transactions that I would allow at Prudential in my capacity.

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Avery - direct

I also understood it was stranger; and, therefore, there was no insurable interest; and, therefore, not only would we not wish to participate for many reasons, it also was an illegal transaction. So we turned the producers away and told them we would not entertain -- even though it resulted in a lot more sales, which ordinarily is the thing I'm in business to do, it is not the type of sales I would want to attract.

Q. I will just remind you to try to slow down as best you can.

A. Sorry.

Q. You mentioned a couple of terms there. We'll go back to your determination about not wanting STOLI in a minute. Let's go over some of the terms you used and may come up today.

Can you just explain at its core what is life insurance?

A. Life insurance is a contract between an insured or owner of the policy and an insurance company that says for a stated level of premiums, that the insurance company will pay a death benefit that is usually stated as well in the contract at death. There may be other benefits in that life insurance policy, but the prime reason for buying it is the death benefit.

Q. What is a universal life policy?

A. There are a number of different forms of life insurance.

Universal life has some features that are different than others. The one primary features are that the premiums

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Avery - direct

1 are flexible, that as long as you pay, you can pay more in if
2 you want and sort of create a larger value within the policy or
3 you can pay a lesser amount, but you have to pay enough to keep
4 it in force.

5 If you violate that, and the contract will state how
6 much you have to pay, but the difference in most traditional
7 life insurance that some of you might be familiar with, the
8 premium is level and required the same every year.

9 This one allows you in some years to pay more and that
10 will enable you to pay less, or vice versa. It gave
11 flexibility to the consumer to alter the amounts as long as
12 they aggregate on a cumulative basis, paid the total amount.
13 That is the primary difference of universal life.

14 Q. You mentioned the term, "risk."

15 Would you just describe what you mean by risk in the
16 context of the life insurance business?

17 A. Well, it is the same whether we are talking life insurance
18 or fire insurance or car insurance. It is the job of the
19 actuary to take into account the expected claims, the expected
20 benefits that would be paid, and from that to determine a
21 premium.

22 The risk, the prime risk in a life insurance contract
23 is death, and you have deaths from -- some are from just age
24 itself, but there are deaths from early onset, accidental
25 deaths and what have you.

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Avery - direct

1 The risks we are measuring primarily is the risk of
2 death, but we are measuring, in order to determine the premium,
3 which is part of the risk process, you're looking at what are
4 the interest rates, the investment returns on the premiums
5 because eventually they'll get paid out as benefit. We are
6 evaluating the lapse, how many people will have a claim while
7 they still own the policy. Not everyone that buys a life
8 insurance contract owns the life insurance contract when they
9 die.

10 They may buy -- an example might be they would buy it,
11 say, for the period of time they have young children in the
12 home and they want to make sure they provide for their family,
13 but they might buy a 20-year policy or they may buy a lifetime
14 policy, but after 20 years they deem they no longer need it and
15 lapse it or surrender it.

16 So it gave them peace of mind during that piece of
17 time that, God forbid, had they passed away, their family would
18 be cared for, but after that risk goes away, the risk of
19 funding and taking care of the family, they may no longer own
20 the life insurance contract.

21 Q. What does the term "lapse" mean?

22 A. "Lapse" generally refers to when a policyholder no longer
23 pays premiums; and, therefore, the contract terminates, the
24 life insurance contract, the arrangement between them and the
25 insurance company terminates. At that point the death benefit

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Avery - direct

1 goes away, there are no more premiums required, and depending
2 on how high they fund it or didn't fund the contract, there
3 might be a surrender value paid out to the insured. "Cash
4 value" it is referred to, but that depends on the type of
5 contract and how well it was funded.

6 At that point the arrangement is over and the
7 insurance has served its purpose and has provided peace of mind
8 to that family during that period of time.

9 Q. Mr. Avery, what is an underwriter?

10 A. Underwriter is someone who is trained in many aspects of
11 life insurance to evaluate the risk. They evaluate the health
12 of the individual. As part of life insurance or part of any
13 insurance that anyone would buy, you're put into a class, a
14 risk class.

15 A common example would be auto insurance. If you're a
16 young male driver, you are put into a risk class. The
17 underwriter is evaluating the age and health and financial
18 status of the individual to see what classification to put them
19 in or decide whether they're insurable.

20 Sadly, if someone has a serious health condition that
21 is likely to result in imminent death, they would be deemed
22 uninsurable, and they could not purchase, and the underwriter
23 would determine that. We have many classifications an
24 underwriter will put insured in which determines the premium
25 they have to pay should they completely purchase.

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Avery - direct

1 Q. You just mentioned underwriters look at many different
2 things including financial status.

3 What role, if any, did financial underwriting play at
4 Prudential in evaluating whether to issue universal life
5 policies?

6 A. Again, my answer will apply to all life insurance including
7 universal life. It plays two roles.

8 The first thing is we want to make sure if someone is
9 buying life insurance, they can afford to buy it. They're not
10 being sold something that -- I'll back up a little. I
11 apologize for this. Agents who sell life insurance get paid
12 for selling, and we want to make sure they're not --

13 MR. ABRAMOWITZ: I believe he is not answering the
14 question.

15 THE COURT: I think that's correct. Can we go back to
16 the question, please.

17 MR. FEINGOLD: Sure, your Honor?

18 THE COURT: Just, yes, reput the question. If the
19 answers could be less in the way of long speeches and more
20 targeted to the question that is asked, I would appreciate it.

21 MR. FEINGOLD: Sure.

22 BY MR. FEINGOLD:

23 Q. Mr. Avery, what role, if any, did financial underwriting
24 play in evaluating the issuance of life insurance policies?

25 A. Two roles. We want to be sure the insured can afford the

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Avery - direct

1 purchase that they were being sold; and, secondarily, we wanted
2 to make sure that the death benefit they were buying was in
3 line with the risk that they had, that they weren't being
4 overinsured.

5 Q. Why is it important that -- the first part of your answer,
6 why is it important to make sure that there is an insurable
7 interest there? Why is it important to Prudential?

8 A. Well, first off, as I stated earlier, if there is no
9 insurable interest, it is illegal to sell the life insurance
10 policy. It is illegal.

11 Second, when we price a policy, we're pricing a policy
12 on the historical experience generally of what we believe are
13 classic insurance. People who have risk, they're buying it to
14 cover their personal risk. We are not pricing it on the basis
15 of what might be the behavior of an investor who hopes that the
16 insured dies quicker than later. Most people buy insurance
17 would hope that they never die.

18 So we would expect a different experience. We don't
19 want to be selling to a group of individuals where: One, where
20 the transaction is illegal; and, two, where we haven't priced
21 for what might be the behavior of a different class of
22 individuals.

23 Q. You also mentioned you want to make sure you weren't
24 overinsuring an applicant. What do you mean by that?

25 A. The simplest example would be if you had a hundred thousand

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Avery - direct

1 dollar home, and you tried to buy a million dollar fire
2 insurance policy, we would be very concerned that you're
3 overinsuring your home.

4 The same with a life. If you're overinsuring the risk
5 that you have -- for example, we look at income, we look at
6 assets and determine what might be the risk you're covering and
7 are you buying insurance commensurate with that risk. If
8 you're buying 4, 5, 20 times more than that, we're concerned
9 about just from public safety. You're now worth a lot more
10 dead than alive. That is not good public policy and not
11 something we would participate in.

12 Now we are concerned about what is the purpose of the
13 insurance. It doesn't look like the insurance we would expect
14 an individual to be buying, so we would not issue excess
15 amounts.

16 Q. Would the concern about overinsurance relate at all to
17 Prudential's business?

18 A. The concern for overinsurance has always been in place
19 since I've known life insurance.

20 Q. During your time at Prudential, focusing on mid-to-late
21 2000nds, in what amounts were universal life policies
22 available?

23 A. Prudential, they were available I believe from the low
24 amount of 75,000 death benefit up to 30 million death benefit.

25 Q. Who gets paid out the death benefit at the time of the

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Avery - direct

1 insured's death?

2 A. The beneficiary, as chosen by the owner of the contract.

3 Q. Are there any tax benefits that are associated with
4 universal life policies?

5 A. There are tax benefits associated with all life insurance,
6 in that in the United States, the death benefit is received
7 tax-free by the beneficiary. There are no taxes on the receipt
8 of that death benefit.

9 Q. Are there any tax benefits associated with the amounts over
10 the premiums that are invested with the policies?

11 A. If the policy is of the type that builds up value. I spoke
12 earlier if you pay excess premiums, you'll build up a cash
13 value. Those amounts accumulate tax-deferred.

14 What I mean by tax-deferred, if you eventually
15 received them as a death benefit, they're not taxed. If you
16 receive the cash value as part of a death benefit, it is
17 received tax-free.

18 If, instead, you lapse the policy, stop paying
19 premiums, and you receive a cash value, then the excess of the
20 cash value over the premiums you've paid is taxable.

21 Q. Mr. Avery, what is premium financing?

22 A. Premium financing is a term used in the industry where the
23 owner-purchaser of the policy is taking a loan through somebody
24 or some organization to finance the premiums rather than paying
25 for it out of their own assets or income.

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Avery - direct

1 Q. Was premium financing for life insurance policies permitted
2 at Prudential?

3 A. I'd say on a limited basis, yes.

4 Q. On what basis was that?

5 A. On the basis that we understood why the premium financing
6 was an appropriate transaction for the insured. We wanted to
7 make sure that the insured understood the premium financing.

8 An example would be today with low interest rates,
9 they might be able to get a premium loan at a very low interest
10 rate, but the terms of the loan might be if rates go up, the
11 cost would go up, the interest rate would go up. We want to
12 make sure they still afford it.

13 We want to understand who is borrowing. Is it really
14 for the owner of the policy or is it masking an investor
15 stranger originated transaction? But we have always looked at
16 premium financing before STOLI even existed to make sure that
17 it was appropriate for the purchaser.

18 Q. How, if at all, would an applicant's finances come into
19 play with Prudential determining whether to issue a policy that
20 was being premium financed?

21 A. We'd want to, as I said, we would want to understand the
22 basis. An example would be you might have a business owner who
23 is very wealthy, and that justifies the amount of insurance
24 being purchased and that they believe they can borrow money at
25 a cheaper rate than using their own assets, which may be

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Avery - direct

1 earning a higher rate within the business. We view that as a
2 valid form of premium financing. They're choosing what assets
3 because their ability to take a loan is one of their assets, is
4 more efficient for them. We would see that as appropriate.

5 If we see someone taking a loan who really can't
6 afford the loan, we would see that as inappropriate.

7 Q. You mentioned the term producer earlier. What is a
8 producer?

9 A. There are many terms used I think in the industry; agent,
10 broker, producer. People refer to themselves as producer in
11 the context I am using is a life insurance salesperson who is
12 not directly, not an employee of Prudential, is independent and
13 works for themselves or works for another firm, but does
14 contract through some media with Prudential to offer Prudential
15 policies as well as offer the policies of other companies.

16 Q. Is that similar to an agent?

17 A. Yes.

18 Q. Do producers and agents receive commission from Prudential
19 for writing policies at Prudential?

20 A. They do.

21 Q. Generally how are commissions for universal life policies
22 calculated at Prudential in the mid-to-late 2000nds?

23 A. Generally depending on the policy, universal life, there is
24 a percentage of first year premium that is paid to the
25 agent-producer, and then there is a lower percentage that is

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Avery - direct

1 paid in what is called renewal years, years two and later, much
2 lower percentage, but the high percentage is in the first year.

3 Q. How high of a percentage could be paid on first year
4 commissions?

5 A. It depends on the level of their contract and the amount of
6 production that they would be giving production. It could go
7 from a low of 55 percent to a high of probably close to a
8 hundred percent.

9 Q. That is a hundred percent of what?

10 A. Of first year premium.

11 Q. Now, were you familiar with how the pricing and the premium
12 amounts for universal life policies were determined at
13 Prudential in the mid-to-late 2000nds?

14 A. I am.

15 Q. Could you just give us the general overview of how the
16 pricing was done.

17 A. Well, again it would be based on age, gender, health, and
18 then our experience with those classifications of age, gender
19 and health.

20 Our experience in terms of mortality and lapse and our
21 outlook on disparate returns, and they would be calculated by
22 the actuary to determine what premiums we needed to charge
23 annually that would give us enough money to pay those death
24 claims that would occur in the future.

25 Q. Let's talk first about mortality experience. What is that?

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1 A. Mortality experience is the probability of death. So the
2 claim is triggered at death, so we would take an age and gender
3 and determine probability by year, and those probabilities go
4 up each year they get older as well as it goes up each year
5 they get further away from underwriting.

6 We only get one shot to evaluate the health and
7 financial well-being of that individual, and that is an issue.
8 The cost goes up each year.

9 Q. You say just the experience part of that. What do you mean
10 by "experience"?

11 A. Experience? Prudential is large enough to price on its own
12 experience. We have business in force that we can look at,
13 say, a female age 35, what their mortality experience is by
14 duration, age 36, 37 all the way up till age 120, and we use
15 that as a starting basis of our estimate of what mortality we
16 will get in the future on that same class.

17 Q. Similar to looking at the history of how these these
18 policies have perform?

19 A. It is more recent history we look at, yes.

20 Q. And lapse experience, can you just briefly explain that.

21 A. Right, that is another factor in pricing because, as I
22 said, not all policies will be held till death.

23 Again we look back at our more recent experience and
24 understand the behavior of individuals of holding policies, and
25 policies lapse for many reasons. One, the need is no longer

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Avery - direct

1 there, the risk is no longer there. You see policies lapse
2 sometimes during divorce. You see policies lapse because they
3 no longer can afford the insurance because there are job,
4 employment issues. We look at our own experience and put that
5 into pricing, adjust it as appropriate based on an outlook of
6 what we think will be occurring.

7 Q. Pricing policies, did Prudential expect that the premiums
8 for each universal life policy would be paid up until the time
9 of the insured's death?

10 A. No.

11 Q. Why is that?

12 A. Because if, if every policy purchased had a death benefit,
13 the premiums would be so large that for the most part people
14 couldn't afford them. If you're paying as much premium as
15 you're going to get in death benefit, why would you buy it? It
16 is similar to auto insurance. You don't pay what a claim will
17 cost. You hope you never have a claim.

18 Those who don't have a claim pay for those who do.
19 That is really the principle of insurance. It is a pulling
20 together of a group of people who pay premiums in. And those
21 who have claims take the premiums back out, and those who don't
22 are fortunate enough to not have incurred a claim and had the
23 peace of mind if they did, they would be covered financially.

24 Q. Let's turn back to STOLI.

25 What was Prudential's position on whether it wanted to

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Avery - direct

1 issue policies that were taken out to be sold to investors? I
2 am talking about the, say, any time in the 2000s?

3 A. Right from the start when we identified what this new
4 marketing scheme was, we decided that we did not want to issue
5 any policies that were being initiated or sold to strangers.

6 Q. What role, if any, did you have in establishing the
7 company's position on STOLI?

8 A. I did establish the policy.

9 Q. Why did you and Prudential take this position?

10 MR. ABRAMOWITZ: I object to the question.

11 THE COURT: Overruled.

12 A. We took the position for I think the reasons I state
13 earlier. One is if there is no insurable interest, it is an
14 illegal transaction. Prudential would not participate in an
15 illegal transaction.

16 Two, as I stated earlier, this class of policyholders,
17 once I understood what was behind this marketing scheme, was
18 not in line with how we price our generic business, that this
19 group of policyholders would not behave the same, and we
20 started to see a number of instances of misrepresentation and
21 fraud associated with those transactions.

22 So it was just not a business we wanted to be in. We
23 were also concerned that we were seeing in this marketing to
24 senior citizens. Senior citizens didn't really understand what
25 they were getting into and it would be bad for them.

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1 Eventually, in fact, I spoke at many conferences on
2 this --

3 MR. ABRAMOWITZ: Your Honor, I object.

4 THE COURT: Are you moving to strike?

5 MR. ABRAMOWITZ: I am moving to strike.

6 THE COURT: Motion denied.

7 BY MR. FEINGOLD:

8 Q. Mr. Avery, you said you started to notice different
9 performance or different experience. How does that impact
10 Prudential's bottom line?

11 A. We didn't see different experience because we tried as best
12 we could not to sell any. We understood from talking to the
13 people that were marketing this that the experience would be
14 very different because we understood how they would need the
15 policies to behave and what the behavior of the investor would
16 be, which would be very different than someone who is buying
17 insurance for their own family or business.

18 Q. With respect to I think you talked about lapse experience
19 earlier, what was your understanding as to how the lapse
20 experience with STOLI would be different from the pool on which
21 Prudential was pricing its insurance?

22 A. These policies, this class of policies would be owned by
23 investors who benefited from death and didn't benefit from
24 anything else, and so we believe that they would continue to
25 pay premiums and that they would try to select insureds where

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Avery - direct

1 they believe based on their evaluation that the premiums were
2 inadequate for the death benefit eventually to be received.

3 They were betting against the house and their behavior would be
4 so different than a normal insured who is hoping to live, not
5 hoping to die.

6 Q. You mentioned a concern about participating in transactions
7 without insurable interest. How would participating in those
8 sorts of transactions impact Prudential's bottom line, if at
9 all?

10 A. Well, I believe if we had sold a large number of these
11 policies, we would incur losses on those policies. I also back
12 then postulated that we would wind up seeing a number of
13 lawsuits regarding these cases which had proven to be true. So
14 we just decided it was bad business.

15 We also thought that we would have insureds or
16 beneficiaries feeling that they somehow were duped, and it
17 would be bad for our reputation to be involved in these
18 transactions for any perspective.

19 If in the end we had to deny claims, the last thing I
20 or Prudential wanted to do was deny claims. We spent a lot of
21 money marketing that we're there when you need us. The last
22 thing we want to do is have someone read a headline that says
23 we denied a claim. They may not read the story. It would be
24 bad for our reputation.

25 (Continued on next page)

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Avery - direct

1 Q. What concerns, if any, did you have that Prudential's bad
2 reputation or potential bad reputation would impact the bottom
3 line?

4 A. Absolutely always concerned about reputation.

5 Q. Why?

6 A. Because we're an organization that needs to sell a lot of
7 insurance to cover costs and to spread the risk. Remember I
8 talked about pooling of risk. You need a large number of
9 people in order to do the insurance. So we're in the market to
10 sell insurance. Bad publicity does not help you generate new
11 sales.

12 Q. Now, when Prudential collects premiums on a policy, does
13 that mean that Prudential makes money on that policy, profits
14 on the policy?

15 A. We don't think of it as ever making money on any one
16 policy. You couldn't determine it that way. You have the
17 individual who pays one premium and dies six months later. You
18 lose a lot of money on that policy, but we don't consider that
19 a loss. We consider that -- that's the benefit of insurance
20 because there's another 900 people who paid a premium who
21 didn't die. And, again, the premium that's paid by everyone
22 pays for those unfortunate enough to pass away.

23 So we don't measure it at a single policy level. It's
24 not a funding means; it's insurance. So just like when one
25 person gets in a car accident, we wouldn't say we lost money on

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Avery - direct

1 that policy. It's we look at the class of policyholders. Did
2 it behave in the average, in the aggregate, how we expected the
3 aggregate to behave because there are untimely unexpected
4 deaths sometimes that occur right after the insurance is
5 purchased. And they're unfortunate legitimate deaths,
6 accidental. That's what insurance is there for.

7 Q. Mr. Avery, was Prudential's position on not wanting to
8 issue STOLI policies communicated to others within Prudential?

9 A. Yes, it was.

10 Q. To whom?

11 A. To our agents and to our -- you have intermediaries,
12 brokers, producers, through the general agencies we engaged,
13 and we communicated in various industry forums about it.

14 Q. You communicated to underwriters at Prudential?

15 A. Yes, it was.

16 Q. Was it communicated to marketing people at Prudential?

17 A. Yes, it was.

18 MR. FEINGOLD: May I approach, your Honor?

19 THE COURT: You may.

20 Q. Mr. Avery, when you answer, could you speak a little louder
21 and closer to the mike so we can make sure we all hear you.

22 A. Okay.

23 Q. Thank you. Great.

24 You have in front of what's been marked as Government
25 Exhibit 2943. Do you recognize this type of document?

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Avery - direct

1 A. I do.

2 Q. What is it?

3 A. It's what we refer to as life underwriting guide. These
4 are memorandums that are put together for our underwriters and
5 we do it on various subjects. This particular one is around
6 different forms of marketing life insurance. And we look at
7 different ways that life insurance is sold and decide whether
8 they're the type and nature of the transaction that we wish to
9 participate in with our products or we wish not to participate
10 in because of the nature and type of sale.

11 Q. Was providing underwriting guidance to Prudential employees
12 like this a regularly conducted activity at the company?

13 A. It's an ongoing activity. This particular one is meant for
14 our underwriters, not all the employees, but the underwriters
15 doing the risk assessment.

16 Q. Was it a regular practice at Prudential to update and make
17 a record of this guidance?

18 A. Absolutely, on all subjects, not just this.

19 Q. Who would compile documents like the one that's marked
20 Government Exhibit 2943?

21 A. There is a corporate underwriting group in Newark, New
22 Jersey who was responsible for maintaining these. And then it
23 would be distributed to our underwriters who work in different
24 organizations in Prudential in other areas, other states.

25 MR. FEINGOLD: Your Honor, government offers 2943.

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Avery - direct

1 MR. ABRAMOWITZ: No objection.

2 MR. STAVIS: No objection.

3 THE COURT: Admitted.

4 (Government's Exhibit 2943 received in evidence)

5 MR. FEINGOLD: Can we publish 2943.

6 Q. Mr. Avery, have you reviewed 2943 prior to today?

7 A. I have.

8 Q. Are you familiar with the substance in this exhibit?

9 A. I am.

10 Q. Can you just read the revised date on the top left?

11 A. April of 2007.

12 Q. And then can you read in the middle where it says
13 general -- do you see that paragraph? Can you read the
14 sentence that starts "more recently."

15 MR. FEINGOLD: And can we blow that up, please. Thank
16 you.

17 A. More recently there has been a proliferation of sales
18 concepts in which the intent from the outset is to settle the
19 life insurance policy. The insured agrees to loan their
20 insurable interest to an investor, group of investors, and/or a
21 settlement company in exchange for cash. These contracts are
22 commonly referred to as investor-owned life insurance, IOLI, or
23 stranger-owned life insurance, STOLI, since the investors
24 typically borrow the premium payments using only an intrinsic
25 value of the life insurance contract as collateral. They are

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Avery - direct

1 also referred to as nonrecourse premium financed contracts.

2 Q. What is nonrecourse premium financing?

3 A. This means generally when someone takes a loan, they have
4 to pledge collateral, maybe their home or their income. In
5 these particular transactions, the only collateral pledged to
6 the lender is the value of the life insurance contract, so
7 there's no recourse beyond the value of the life insurance
8 contract.

9 Q. Would Prudential issue large life insurance policies that
10 had no collateral for the financing?

11 A. To the best of my knowledge, no.

12 Q. If you can turn to the second page, please, it's Prudential
13 2867 on the bottom right. And do you see the section, Section
14 B?

15 A. Yes.

16 MR. FEINGOLD: Can we blow that up, please.

17 Q. Can you please read that section.

18 A. IOLI, STOLI, and nonrecourse premium financed contracts:
19 These contracts attempt to utilize life insurance policies as
20 investment vehicles. They are usually sold with the intent of
21 immediately settling the contract upon the expiration of the
22 contestability period.

23 These sales involve features such as: free insurance
24 for the insured for a limited period of time since most
25 premiums are financed; an up-front payment to applicants to

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Avery - direct

1 entice their participation; a loan to purchase the policy with
2 an option for the policyowner to decide to pay off the loan and
3 keep the policy, or to sell the policy to a life settlement
4 company; funding of the policy through a trust created for
5 investors' purpose employing nonrecourse financing that uses
6 only the policy as collateral, even if the cash value later
7 becomes inadequate to support the debt; life insurance and/or
8 annuity policies on pools of insureds that fit specific age
9 and/or health characteristics.

10 Investors have no insurable interest in the life of
11 the insured. They are simply speculating on the premature
12 death of the insured in order to receive an investment return.

13 Q. Are the characteristics listed in this section consistent
14 with what your understanding of STOLI was?

15 A. Yes, they are.

16 Q. If you could turn to the next page, it's stamped Prudential
17 2868. Do you see the bottom part No. 4?

18 A. Yes.

19 Q. Could you please read that section "red flags in
20 underwriting," can you read the first paragraph and the first
21 sentence in the second paragraph.

22 A. Prudential believes that these types of programs are
23 inconsistent with the basic principles of life insurance and
24 are not in the interest of policyowners or the insurance
25 industry. The company does not support the sale of life

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1 insurance so that the policyowner can sell it to a third party
2 who is speculating on the premature death of the insured.

3 The company will not issue insurance if it is
4 determined that the policy is likely being applied for as part
5 of one of the above arrangements.

6 Q. Can we then turn to the next page, please, Prudential 2869.
7 And at the very bottom in bold, can you please read the bolded
8 section, the first bullet, going on to 2870.

9 A. As part of our ongoing efforts to detect and prevent these
10 types of sales, a new policyowner statement form, COMB113794,
11 was developed. This new form is required at the point of sale
12 on all term essential/term elite and UL/SUL policies where the
13 proposed insured is age 70 or older and the face amount is
14 1 million or above. If there are any yes responses on this
15 form, the case must be referred to the tech team. Exhibit 12
16 provides a sample copy of the form.

17 Q. Before we look at Exhibit 12, could you just tell us,
18 UL/SUL policies, what are those?

19 A. UL is universal life, which we discussed before, the
20 flexible premium form of life insurance. SUL is a universal
21 life policy that it covers two lives and the death benefit is
22 paid at the second death, referred to as survivorship universal
23 life, used in estate planning generally.

24 Q. All right. If we could turn to Exhibit 12, which is at
25 Prudential 2871. Is this the form that was referenced in the

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Avery - direct

1 document we were looking at?

2 A. It is.

3 Q. And if you could just look top left, what's the date at
4 least of this version of the form?

5 A. April 2007.

6 MR. FEINGOLD: If we could zoom in on the questions
7 starting with the bold "Prudential will not knowingly" and
8 going down to the bottom, please.

9 Q. Mr. Avery, can you please read starting with "Prudential
10 will not knowingly participate" and then read the first
11 question.

12 A. Prudential will not knowingly participate in a life
13 insurance sale where the sale of the policy in a secondary
14 market or the participation of investors in the policy death
15 benefits is being considered. Accordingly, the policyowner is
16 asked to answer the following questions.

17 Question 1. Have you or the proposed insured been
18 offered free insurance or any inducement, such as cash payment,
19 gifts, loan proceeds in excess of the amount necessary to fund
20 the policy, or anything else of value as an encouragement to
21 apply for this life insurance policy? Yes or no.

22 Q. What was the purpose of asking this question as part of the
23 application process?

24 A. We were understanding the various traits of a STOLI sale
25 and we were trying to, through asking these questions, both

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Avery - direct

1 uncover those STOLI sales and make sure we didn't do them; and
2 also make sure we established a record from both the insured
3 and the producer or agent that the sale was not STOLI.

4 Q. Can you please read the second question.

5 A. Have you or the proposed insured been solicited to sell or
6 transfer, or had any discussions about selling any of the
7 following to a life settlement company or group of investors in
8 the next five years: The proposed life insurance policy; any
9 other life insurance policy on the life of the proposed
10 insured; or, a trust, limited liability company, or other
11 entity that has been or will be established to own the policy?

12 Yes or no.

13 Q. Why was this question being asked?

14 A. Well, again, it's another question to make sure that
15 there's not the anticipation of a sale to a stranger as part of
16 the original sale. And we began to add things like trusts
17 because we found that trusts could be used sometimes to
18 disguise the true eventual owner of the contract.

19 Q. Please read question 3.

20 A. Have you or the proposed insured entered into or been
21 offered a financing arrangement where a lender or other third
22 party, other than your employer or family member, will receive
23 any portion of the death benefit of the policy applied for in
24 excess of repayment of the principal and interest? Yes or no.

25 Q. Why was this question being asked?

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Avery - direct

1 A. Well, as I said, there are legitimate premium financing.
2 But if the individual or firm that's providing the loan is
3 going to get more back than would normally be paid back in a
4 loan, then we believe that's disguised stranger-owned life
5 insurance, that there's a stranger, somebody that has no
6 insurable interest receiving part of the death benefits above
7 what they would normally do in a modified loan transaction.

8 Q. Question 4.

9 A. Are you or the proposed insured considering the sale or
10 transfer of the policy being applied for to a life settlement
11 company or other third party investors within the next five
12 years?

13 Q. Why was this question being asked?

14 A. This question was trying to get at intent of the purchase
15 because we found that in some cases, it would be claimed that
16 at the point of the original sale, there was no sale to a
17 stranger, and that if the sale occurred five days later, then
18 it did not violate insurable interest. And we believe if the
19 intent was there at the time of the original purchase of the
20 life insurance contract that it did violate it and so we wanted
21 to know whether there was any contemplation of sale in the next
22 five years because, if so, then we would deem it STOLI and not
23 issue the contract.

24 Q. Finally, No. 5, please read that question.

25 A. Will any entity other than a life insurance company, life

D9OLBIN2

Avery - direct

reinsurance company or medical service provider engaged by either of these companies be medically evaluating the proposed insured to determine life expectancy? Yes or no.

Q. Why was this question being asked?

A. Well, one of the traits of investor investing in a life insurance policy would be they want to know how long the insured is going to live because they want to know whether it's a good investment or not, whether the premiums will have a good return when they get the death benefit. So if a stranger, someone other than the insurance company is evaluating the life expectancy of the insured, that suggests to us that someone else is going to own this policy and it's STOLI and we would not issue the policy.

Q. Were the answers that would be provided to these questions in applications, were those answers important to the company?

MR. ABRAMOWITZ: I object.

THE WITNESS: Yes.

THE COURT: Overruled.

A. Yes. This was put in because they were extremely important for us to help us try to identify STOLI.

Q. Did you consider them to be important to the company's financial health?

MR. ABRAMOWITZ: Same objection.

THE COURT: Overruled.

A. We did.

D9OLBIN2

Avery - direct

1 Q. What would have happened had any applicant answered yes to
2 the questions that are asked in this form?

3 A. We would have a further conversation and if we deemed that
4 the yes answer gave us evidence that it is STOLI, we would not
5 issue the contract.

6 MR. FEINGOLD: May I approach, your Honor?

7 THE COURT: Yes.

8 Q. Mr. Avery, you have in front of you Government Exhibit 112
9 and Government Exhibit 118.

10 Let's talk about 112. Are you familiar with this form
11 of document?

12 A. Yes, I am.

13 MR. FEINGOLD: I should note 112 has been admitted.
14 Ms. Hayakawa, would you please pull up the first page of
15 112.

16 Q. What is Government Exhibit 112, Mr. Avery?

17 A. It is an application to apply for the issuance of a life
18 insurance policy.

19 Q. Just to be clear, are you familiar with this particular
20 application of Florra Adler?

21 A. No, I'm not.

22 Q. You're just familiar with the form of the document?

23 A. The form of the document only.

24 Q. If we could turn to page 2, which is stamped 126210, and if
25 we could look at the top section, coverage information.

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Avery - direct

1 A. Yes.

2 Q. Plan of insurance. What is UL plus?

3 A. It's a form of universal life policy. It just had the word
4 "plus" in there because it had some distinguishing benefits
5 that the other UL would not have. Just a different form.

6 Q. And No. 2, initial amount of insurance, how much insurance
7 is being applied for here?

8 A. \$4 million.

9 Q. And that's the death benefit that would be paid out at
10 death?

11 A. That is the death benefit.

12 Q. If you could go nine pages in, the control number on the
13 bottom right is 126216. And if we could look at the top part
14 under how are the purpose and amount of the policy determined
15 and then the purpose. If we could zoom in on that, please.

16 Mr. Avery, do you see where it says purpose and then
17 personal, what's checked off?

18 A. At the top it says how did you determine the amount of the
19 policy? And it says estate analysis. And then purpose is
20 death and personal for personal death benefit and for estate
21 conservation.

22 Q. Why were these questions asked in Prudential's application?

23 A. Questions like this are always asked to understand the
24 purpose, why is someone buying insurance and understand why
25 they might be buying the amount they're buying.

D9OLBIN2

Avery - direct

1 Q. Why was that important to Prudential?

2 A. Again, we have a few things we want to make sure: one,
3 there's an insurable interest; and, two, that the amounts being
4 applied for are covering an actual risk that exists so that the
5 person is not overinsuring and, again, worth more dead than
6 alive.

7 MR. FEINGOLD: Next section: What is the source of
8 initial and future premiums? If we could zoom in on that,
9 please. The entire section, please. Thank you.

10 Q. Mr. Avery, where it says what is the source of initial and
11 future premiums, what's checked off in response to that
12 question?

13 A. Under initial premium, it says current income or savings.
14 And under future premium, it says current income or savings
15 account.

16 Q. Why did Prudential ask about the source of initial and
17 future premiums?

18 A. There are many reasons why we want to understand where the
19 premiums are coming from. One, we want to make sure the
20 insured understands where it's coming from and that they can
21 afford it. And, two, we want to understand is there anyone
22 else behind the scenes funding this policy.

23 But these questions have been around for a long, long
24 time. The prime reason was do they have the means to buy this
25 policy, not just the initial premium, but future premiums.

D9OLBIN2

Avery - direct

1 MR. FEINGOLD: Could we go down to the next section,
2 supplementary information, bottom half of the page. Zoom in on
3 that, please. Thank you.

4 Q. Mr. Avery, do you see question 5, premium will be paid by,
5 what's checked off?

6 A. Insured.

7 Q. And 7A, complete if face amount is \$1 million or greater.
8 Net worth?

9 A. Net worth listed here is at four and a half million
10 dollars.

11 Q. And 7B, complete if face amount is \$5 million or greater.
12 I think you testified that this reflected a \$4 million
13 application.

14 Had the application been for \$5 million or more, would
15 the applicant have had to fill in greater details about assets
16 and net worth?

17 A. Yeah. At 5 million and above we want to understand the
18 assets, the breakdown of the assets, what's the source because
19 the policy is going to be a lot more expensive. We want to
20 understand are those assets liquid and do they create the risk
21 that's being covered for the insurance. So we want to know
22 more information as the policy gets larger.

23 Q. Generally speaking, regardless of the face amount, why is
24 this application asking for information about income and net
25 worth?

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Avery - direct

1 A. Again, the starting point is is the insurance affordable to
2 the applicant and, two, is the amount of insurance they're
3 buying commensurate with the financial risk that they must have
4 if they have premature death.

5 Q. If you could turn to page 12622. It's about 19 pages in.

6 A. Twenty?

7 Q. I'm sorry 12622, it's a signature page. It's the same
8 document, Government Exhibit 112. There are control numbers on
9 the bottom right.

10 A. Yeah, I have them. I have six digits on all of them, I
11 believe.

12 Q. I'm looking at 126222.

13 A. 222.

14 Q. I may have misspoke. I apologize.

15 A. Okay.

16 MR. FEINGOLD: If we could just zoom in on the
17 signatures at the bottom.

18 Q. Now, you see the bottom signature line, it says signature
19 of writing representative.

20 What's a writing representative?

21 A. That would be the agent or producer that we referenced
22 earlier. That's the person who's selling the contract to the
23 insured.

24 Q. Why did Prudential require that the producer or agent sign
25 these applications?

D9OLBIN2

Avery - direct

1 A. They are the one that's bringing the insured to Prudential.
2 We also want to make sure they're accountable for the answers
3 to these questions to the best of their ability, and they're
4 also representing various aspects of this application. And
5 it's also who will be paid should the sale be completed.

6 Q. Can you please turn to Government Exhibit 118, which has
7 been admitted, and if we could please publish the second page
8 of 118.

9 Mr. Avery, do you recognize this part of the
10 application package?

11 A. I do.

12 Q. Is this the same or similar form that we saw in Government
13 Exhibit 2943?

14 A. It is.

15 Q. And if we could -- is there a line for signature and
16 producer on this page as well?

17 A. There is.

18 Q. And why did Prudential require the producer sign this form
19 as well?

20 A. To make sure that they were working with the insured to
21 give us truthful answers to these questions, that they were
22 attesting to these questions as well. They're basically saying
23 they have no knowledge of any plans to sell this policy that's
24 being applied for to a life settlement or viatical company.

25 Q. Was this form used by Prudential to screen out STOLI

D9OLBIN2

Avery - direct

1 business?

2 A. It was.

3 MR. FEINGOLD: May I have one moment, your Honor.

4 Q. Mr. Avery, are you familiar with the term life settlements?

5 A. I am.

6 Q. What is a life settlement?

7 A. A life settlement is where an individual who's owned the
8 life insurance policy for some period of time and decides they
9 no longer need it, they can go to what's referenced as a life
10 settlement company and potentially sell their interest in that
11 contract for a sum of money and the life settlement company
12 will take over ownership of that policy.

13 Q. Did Prudential's policies permit the sale of a life
14 insurance policy after it was issued?

15 A. They did.

16 Q. Why did Prudential's policies permit that?

17 A. It was required by state law.

18 Q. Now, does Prudential factor in the life settlement business
19 in pricing its policies?

20 A. The life settlement business was a small business. So I'd
21 say as the experience evolves, it got factored in, but it's
22 only as it evolved. And typically the life settlement business
23 was dealing with very old policies which tended to be very
24 small face amounts from years ago, and so it would have a
25 modest impact as long as it was those very old policies of low

D9OLBIN2

Avery - direct

1 face amounts.

2 Q. How would you distinguish the life settlement market with
3 STOLI, if at all?

4 A. STOLI is sort of a subset of the life settlement business.
5 Life settlement business, again, can deal with policies that
6 were very old. But the STOLI business also required a
7 settlement, but it was anticipated, the settlement was
8 anticipated coincident with the purchase of the policy and
9 that's the part that we object to.

10 Q. Whereas with a legitimate life settlement transaction, what
11 was the anticipation at the issuance of the policy?

12 A. Again, we -- the anticipation was whatever was developing
13 in our experience, studies around mortality and lapse and
14 premium payment patterns.

15 Q. And in the mid-2000s, was STOLI part of your experience on
16 which you were pricing products?

17 A. No. We never wanted it to be part of our experience.

18 MR. FEINGOLD: One moment, your Honor.

19 No further questions.

20 MR. ABRAMOWITZ: Your Honor, may we take a five-minute
21 break, please?

22 THE COURT: Okay. I guess we're taking a five-minute
23 break. Don't discuss the case. Keep an open mind.

24 (Recess)

25 THE COURT: Sir, you're still under oath.

D9OLBIN2

Avery - direct

1 Mr. Abramowitz.

2 MR. ABRAMOWITZ: Thank you, your Honor.

3 CROSS-EXAMINATION

4 BY MR. ABRAMOWITZ:

5 Q. Good afternoon, Mr. Avery. My name is Elkan Abramowitz. I
6 represent Michael Binday.

7 A. Good afternoon.

8 Q. I believe you testified on your direct towards the end that
9 the insurance policies issued by Prudential and, for that
10 matter, other insurance companies contain the right to sell the
11 policy. Is that correct?

12 A. Right to sell or assign, yes.

13 Q. Sell or assign. What does assign mean?

14 A. It means that you can give the policy to someone else,
15 generally in exchange for something else.

16 Q. And that was part of the bargain that Prudential would
17 enter into with the insured; is that correct?

18 A. That is part of the contract, yes.

19 Q. Part of the contract. And that means that the day after,
20 the day after they sign the contract, they could sell that
21 contract; is that correct?

22 A. That is correct.

23 Q. Now, as you sit here today, Mr. Avery, are you aware as to
24 whether STOLI policies are legal or illegal?

25 A. I don't know your definition of STOLI policies.

D9OLBIN2

Avery - cross

1 Q. Your definition of STOLI policies.

2 A. My definition of STOLI policy, they're illegal.

3 Q. They're illegal?

4 A. Yes, sir.

5 Q. Have you been able to persuade any state legislature,
6 court, Supreme Court of the United States, or the United States
7 Congress of that fact?

8 A. Yes, we have, as an industry.

9 Q. As an industry. Tell me where it is written that STOLI
10 policies, as you define them here, is illegal?

11 A. The National Council of Life Insurance Legislators and the
12 NAIC, two regulatory bodies have passed model regulation to
13 make STOLI illegal. And those laws or versions of them have
14 been adopted by possibly 26 or more states at this time. It
15 might be more since I've retired.

16 Q. Are they -- have they been adopted in New York?

17 A. I don't know, sir, what's in New York today.

18 Q. Have they been adopted in Florida?

19 A. I'm not sure the state-by-state listing, sir.

20 Q. If you had your way, I take it, Mr. Avery, they should be
21 banned, is that correct, not permitted?

22 A. The lack of insurable interest alone would make them not
23 permitted today. We believe that regulations are just
24 codifying existing law in regulation.

25 Q. The lack of insurable interest disappears the minute the

D9OLBIN2

Avery - cross

1 policy is sold; is that correct?

2 A. The requirement disappears, yes.

3 Q. The requirement.

4 A. The requirement disappears, yes.

5 Q. Gone. So, again, if sold the next day, the insurable
6 interest is gone; is that correct?

7 A. As long as there was no intent from the beginning.

8 Q. But people can change their minds; is that correct?

9 A. We would find it very strange that someone would buy a
10 \$5 million policy and change their mind the next day.

11 Q. You might find it strange, but is it legal, Mr. Avery?

12 A. It is legal, yes, sir.

13 Q. Thank you very much.

14 Now, you went through a whole long list of things to
15 watch out for, telling your underwriters be careful of all
16 these, all of these red flags of STOLI; remember that?

17 A. Yes, sir.

18 Q. Person over 70, right, that's one of the red flags, the
19 insured is somebody to be over 70; is that correct?

20 A. Not in and of itself, no.

21 Q. That's one. Is that one of the red flags?

22 A. Over 70 and a million dollar policy. They had to be
23 combined.

24 Q. Okay. A million, over a million?

25 A. Million or over.

D9OLBIN2

Avery - cross

1 Q. And so that's a red flag right away because you testified,
2 did you not, that some people in their mid-thirties and forties
3 get life insurance to protect their family situation if their
4 children are still living, etc.; is that correct?

5 A. That is correct.

6 Q. Now, generally speaking, would people over 70, would that
7 be still a factor that you would suspect people at that age
8 taking out insurance would consider important?

9 A. Some transactions, although they would be in the minority.
10 Most would be estate planning or business protection.

11 Q. And how about -- well, estate planning to get the death
12 benefit; is that right?

13 A. That is correct, or estate liquidation, distribution.

14 Q. It would be to get the death benefit, not to necessarily
15 protect the children?

16 A. That's correct. Well, the estate liquidation is sometimes
17 to protect the children in a liquidation of the estate.
18 Different form of protection.

19 Q. Now, Mr. Avery, you said that you didn't want your
20 underwriters to get these policies, right, you didn't want
21 them, if they saw these red flags, your instruction was do not
22 write these policies; is that correct?

23 A. Do not issue them, that is correct.

24 Q. Did you ever implement any type of procedure that would
25 insure that the financial information that was furnished on

D9OLBIN2

Avery - cross

1 these transactions was correct?

2 A. Yes, we did.

3 Q. And did you, for example, ask that a copy of the tax return
4 be attached to the policy?

5 A. I think in some instances --

6 Q. The application, excuse me.

7 A. In some instances we may have. But tax returns are quite
8 private information for wealthy people, and so that's not
9 always the best way to do it.

10 Q. Quite private?

11 A. Quite private.

12 Q. But their net worth statement, not so private?

13 A. They have to provide the information or we wouldn't issue
14 them.

15 Q. Right.

16 A. If they decide to keep it private, they could, but we
17 probably would not issue without the information.

18 Q. Right. So the net worth statement is submitted, but you
19 think that if you asked people to attach the tax return that
20 they might resist doing that?

21 A. It wasn't what I thought. It was the pushback we might get
22 from the producer or broker dealing with that client and
23 sometimes.

24 Q. The pushback, the pushback?

25 A. Pushback.

D9OLBIN2

Avery - cross

1 Q. Did it ever occur to you that the pushback would be because
2 if you submitted the tax return, you wouldn't know precisely
3 how much that person was worth or how much money that person
4 had --

5 A. If they pushed back --

6 Q. -- in income?

7 A. If they pushed back, we would try to use other means to
8 discover whether they truly were of the financial means they
9 indicated.

10 Q. I'm asking you as a matter of policy in your capacities
11 over the years in Prudential, did your company ever in
12 connection with STOLI red flag-type policies ever request that
13 a tax return be attached to the application, ever?

14 A. I cannot answer what our underwriters might have asked for
15 in a specific case, but it was not our policy to request it.

16 Q. It was never your policy; is that correct?

17 A. As best I know.

18 Q. Was it ever your policy to request that the applicant
19 attach bank statements to the applications?

20 A. I again don't know. Our underwriters would ask for
21 whatever information they thought they could get. I don't know
22 what they specifically asked for.

23 Q. Mr. Avery, policy. Was it ever the policy of your company
24 to require copies of bank statements attached to applications,
25 especially in those cases where you were looking for red flag

D9OLBIN2

Avery - cross

1 STOLI?

2 A. I don't believe it was our policy.

3 Q. Was it ever the policy of Prudential to ask for a credit
4 check of the applicants, a credit check?

5 A. At some times in our history, we did get credit checks, but
6 we employed individuals who sought to discover publicly
7 available information on insureds. And depending on the face
8 amount being purchased, we would do our own investigation as
9 best we could with public records to get information on the
10 financial status of the insured, yes.

11 Q. Now, over a million dollar policy, person over 70, life
12 insurance trust as a beneficiary, was there ever a policy to
13 require a credit check from publicly available information, yes
14 or no, Mr. Avery?

15 A. We had a policy of investigating through publicly available
16 information all data available to us to check the financial
17 well-being of certain applicants, yes.

18 Q. STOLI applicants?

19 A. All -- we don't know they're STOLI, sir.

20 Q. Was there anything in the exhibits that you testified about
21 today that exhibited that policy that you're talking about
22 where they're supposed to check public records?

23 A. No. These exhibits did not include what our investigators
24 did as part of their normal day-to-day job.

25 Q. Was there ever a policy at Prudential to request that the

D9OLBIN2

Avery - cross

1 home that's listed on the application be appraised by a third
2 party?

3 A. No, we did not have a policy of appraising a home. But as
4 part of our public records search, we would look at the value
5 of homes if we could discover the homes.

6 Q. You were shown --

7 MR. ABRAMOWITZ: One moment, your Honor.

8 Q. Now, where is this policy that we could look to to see that
9 your underwriters knew to check the public records or get an
10 appraisal for any homes that may have been listed?

11 A. It was not our underwriters. It was our special
12 investigation units who did it on behalf of the underwriters.

13 Q. With respect to testimony about lapsed rates, Mr. Avery,
14 could you tell the Court and jury what is term insurance?

15 A. Term insurance is a form of life insurance that typically
16 has a limited stated period upon which the death benefit will
17 be paid or the policy will be in force. It could be ten years,
18 15 years, 20 years or 30 years. They're the normal terms.

19 At the end of that period, depending on the contract,
20 it either ends and there's no more insurance, or you're given a
21 right to convert it to a permanent insurance.

22 Q. And I take it that the requirement to pay premiums lapses
23 by virtue of the term of the insurance contract itself; is that
24 correct?

25 A. At the end of the stated period, whether it's ten, 20 or 30

D9OLBIN2

Avery - cross

1 years, the coverages ends. It's not considered a lapse at that
2 point. The policyowner didn't take any action -- the contract
3 expired -- and they may have a right to convert depending on
4 the form of contract.

5 Q. But the universal life policies we've been talking about
6 today have no term; is that correct?

7 A. They go till death.

8 Q. Till death.

9 A. That's correct.

10 Q. And the benefit that the insured is contracting for is a
11 payment by the insurance company upon his or her death; is that
12 correct?

13 A. Yes, that's correct.

14 Q. No matter when it happens?

15 A. That is correct.

16 Q. And the --

17 A. As long as the premiums are paid.

18 Q. And the obligation of the insured is to pay the premiums?

19 A. That is correct.

20 (Continued on next page)

21

22

23

24

25

D9OJBIN3

Avery - cross

1 Q. So when you talk about lapse rates, the expectation under
2 the insurance contract is that it will not lapse, is that
3 correct, under the contract?

4 A. No. First off, the contract does not speak to
5 expectations. The pricing covers expectations. In fact, in
6 the contract pricing, there is the expectation of lapse based
7 on historical experience.

8 Q. When you say "based on historical experience," you can look
9 at all the policies that Prudential has written even if they've
10 written STOLI without your knowledge. Is that right?

11 A. We do look at all the policies, yes.

12 Q. Right. So if STOLI policies somehow got through these very
13 severe -- withdrawn.

14 If the STOLI policies somehow slipped through the
15 cracks, they would be counted in this experience that you
16 talked about and perhaps the pricing could be changed based
17 upon that experience. Is that correct?

18 A. If they had slipped through, they would be counted. They
19 may be small, and also STOLI only began really relatively
20 recently compared to all the data.

21 Q. STOLI is not small by definition. Is that correct?

22 We are talking about multi-million dollar policies,
23 several hundred thousands a year in premiums. That is not
24 small by your definition. Is that correct?

25 A. No, not at all small.

D9OJBIN3

Avery - cross

1 Q. The life settlement industry I believe you testified was
2 small. What is your definition of "small"?

3 A. Relative to the amount of insurance that we sell each and
4 every year or, more importantly, relevant to the amount of
5 insurance we have in force.

6 Q. But it still is a multi-million dollar industry. Is that
7 correct?

8 A. Not at Prudential.

9 Q. Not at Prudential? How about the world?

10 A. I am not privy to the data.

11 Q. In all your committees and all your work with trying to get
12 legislation passed, have you learned that STOLI, the life
13 settlement industry is a multi-billion dollar industry?

14 A. Yes, we have seen that report by the life settlement
15 industry itself.

16 MR. ABRAMOWITZ: May I have a minute, your Honor?

17 (Off-the-record discussion)

18 BY MR. ABRAMOWITZ:

19 Q. Mr. Avery, just for informational purposes, when Prudential
20 gets its premiums in on any policy, does it invest those
21 premiums?

22 A. What is left after expenses absolutely gets invested, yes.

23 Q. I take it that is on an ongoing basis?

24 All the premiums after accounting for expenses is
25 invested and money is made on that. Is that correct?

D9OJBIN3

Avery - cross

1 A. After expenses and benefits paid out, and that is included
2 in the product pricing.

3 MR. ABRAMOWITZ: May I, your Honor?

4 THE COURT: You may.

5 (Pause)

6 BY MR. ABRAMOWITZ:

7 Q. Mr. Avery, I show you what has been marked Defendant's
8 Exhibit 155 for identification and ask you have you ever seen
9 that document before?

10 A. I have.

11 Q. You have reviewed it?

12 A. I have.

13 Q. You know Mr. Nils Gyllenhammer?

14 A. I do.

15 Q. Who is Mr. Gyllenhammer?

16 A. He worked in our -- Nils Gyllenhammer worked in our product
17 pricing area in individual life insurance company.

18 MR. ABRAMOWITZ: I offer the exhibit into evidence.

19 MR. FEINGOLD: Objection, your Honor.

20 THE COURT: My copy? Where is my copy?

21 MR. ABRAMOWITZ: It is a corporate admission.

22 THE COURT: Objection sustained.

23 BY MR. ABRAMOWITZ:

24 Q. Now, you said you reviewed the document. Let me ask you
25 specifically --

D9OJBIN3

Avery - cross

1 THE COURT: Don't try to get its contents in, please.

2 MR. ABRAMOWITZ: No. I will ask him. Not the
3 contents. I'll put it away.

4 BY MR. ABRAMOWITZ:

5 Q. Do you know, Mr. Avery, whether Prudential varies its cost
6 of insurance based upon the insured's assets?

7 A. Not directly, no.

8 Q. Do you know whether Prudential varies its cost of insurance
9 depending upon whether the insured had an intent to sell the
10 policy?

11 A. No, because we wouldn't issue it, so it would not be in our
12 experience.

13 Q. If it slipped through, did Prudential vary the cost of
14 insurance depending upon whether the insured had an intent to
15 sell the policy?

16 A. No.

17 Q. Did Prudential vary its cost of insurance depending upon
18 whether the premium would be paid with the purchaser's own
19 funds or with borrowed or other funds?

20 A. No.

21 Q. Did Prudential vary its cost of insurance depending upon an
22 insured's purpose for purchasing the insurance?

23 A. No.

24 Q. Did Prudential vary its cost of insurance depending on
25 whether the purchaser had any other pending applications for

D9OJBIN3

Avery - cross

1 effective policies for life insurance at the time of the
2 purchase?

3 A. No.

4 MR. ABRAMOWITZ: I have no further questions.

5 CROSS-EXAMINATION

6 BY MR. STAVIS:

7 Q. Mr. Avery, good afternoon.

8 A. Good afternoon.

9 Q. Did you receive a subpoena to testify here today?

10 A. I did.

11 Q. Did you have an opportunity to meet with prosecutors prior
12 to your testimony here today?

13 A. I did.

14 Q. Did you do that a number of times?

15 A. Twice.

16 Q. Did you do that on August 7th of this year, 2013?

17 A. It was in August. I don't know the exact date.

18 Q. Did you meet on September 13th?

19 A. We met in September. I don't know the exact date.

20 Q. Did you meet on September 22nd?

21 A. I don't recall. I thought we met twice.

22 Q. Now, you testified on direct examination --

23 A. -- in fact, I know we only met twice, once in Princeton and
24 once in New York.

25 Q. -- you testified on direct examination the STOLI policies

D9OJBIN3

Avery - cross

1 resulted in more sales, and that's something you would
2 ordinarily want, but you didn't want it with the STOLI
3 policies. That was your testimony, correct?

4 A. That is correct.

5 Q. So there were more sales for Prudential, the company, that
6 you were, as CEO of life insurance, as a result of the STOLI?

7 A. No. I said there would have been had we not prevented
8 STOLI. We tried our best we could to prevent.

9 Q. You tried your best?

10 Your efforts to prevent STOLI came after you
11 recognized what STOLI was, correct?

12 A. But possibly before transactions were coming to us.

13 Q. You weren't a hundred percent effective --

14 A. Clearly.

15 Q. -- in combating STOLI. That is a fair statement; isn't it
16 correct?

17 A. What we found is --

18 THE COURT: Yes or no, sir?

19 THE WITNESS: We were not a hundred percent
20 successful.

21 MR. STAVIS: Thank you.

22 BY MR. STAVIS:

23 Q. The STOLI policies paid premiums, as you testified,
24 correct?

25 A. Correct.

D9OJBIN3

Avery - cross

1 Q. You testified on direct that you would get investment
2 returns on the premiums because you hold them, correct?

3 A. That's correct.

4 Q. You testified just a few minutes ago when Mr. Abramowitz
5 was asking you questions concerning investing returns, correct,
6 after benefits and expenses and all the other things?

7 A. That is correct.

8 Q. Would it be fair to say that the investment return on what
9 came in from those premiums would be more than, say, someone
10 would get if they bought a CD at their local savings bank?

11 A. Yes.

12 Q. Now, I want to just get a sense.

13 You rose to the level of the CEO, chief executive
14 officer, of the life insurance branch of Prudential?

15 A. The United States life insurance branch.

16 Q. The United States?

17 A. Yes.

18 Q. Was there a CEO of everything that was somehow above you?

19 A. There was an executive into which various domestic
20 businesses report to, yes.

21 Q. And not all those businesses were life insurance?

22 A. None of them domestic. I am referring to domestic, U.S.
23 business. We have life insurance companies, businesses in
24 other countries.

25 Q. Yes.

D9OJBIN3

Avery - cross

1 A. All the domestic businesses report to one individual, and
2 there was an individual life insurance that I ran. There was a
3 group insurance business. That was the only other life
4 insurance domestic business, and that was group insurance for
5 employers.

6 Q. Yours was individual life insurance?

7 A. That's correct.

8 Q. Policies sold to individual insureds?

9 A. Yep.

10 Q. People who wanted a policy?

11 As to that, you were, for want of a better word, the
12 top person?

13 A. That is correct, when it came to individual domestic life
14 insurance, yes.

15 Q. How many employees total -- not talking agents yet, I'll
16 break it out -- how many employees total did you have to
17 oversee when you were the CEO of individual life insurance?

18 A. It varied over time, as you might expect, but I would say
19 in the ballpark of 3,000, not counting our distribution system
20 which was another 3,000.

21 Q. You've testified that there are -- you called them by
22 various names. Producers, that was one name you used, correct?
23 You have to answer --

24 A. Yes, producers, yes.

25 Q. -- so the court reporter picks it up.

D9OJBIN3

Avery - cross

1 A. Yes, yes.

2 Q. Agents?

3 A. Yes.

4 Q. And brokers?

5 A. Yes.

6 Q. Now, you were referring in your direct examination -- by
7 the way, are those different terms for the same thing?

8 A. I think they're terms of art. In our case, we refer to
9 agents as those producers who were directly employed by
10 Prudential, carried Prudential business cards. We tended to
11 refer to brokers and producers as those who were independent of
12 us but brought us business.

13 Q. So let's take the agents. Those are the ones with the
14 Prudential business cards. How many of those were under your
15 direct authority when you were the CEO of life insurance, of
16 individual life insurance?

17 A. All of them.

18 Q. A number I am asking for, roughly?

19 A. Agents, probably 1400, 1500 at the time.

20 Q. Those are the Prudential employees?

21 A. That's correct.

22 Q. Now let's shift over to the non-Prudential employees who
23 you would refer to as the producers or the brokers.

24 A. Yes.

25 Q. And these producers or brokers are affiliated with

D9OJBIN3

Avery - cross

1 Prudential, in that they sell Prudential products, correct?

2 A. Yes.

3 Q. "Products" being life insurance of some sort or another?

4 A. Yes.

5 Q. But they're not directly employed --

6 A. That's correct.

7 Q. -- by Prudential?

8 A. That's correct.

9 Q. If you could approximate for the jury how many of those
10 would you have within your purview as the CEO of the individual
11 life insurance for Prudential?

12 A. In order to sell Prudential, they have to be appointed.

13 Q. Yes.

14 A. I would say that varies over time, but it could be as many
15 as 30 to 50,000 because they may be appointed, but that doesn't
16 mean they place business in any given year with us. The number
17 sounds larger than it truly is.

18 Q. Are you able to break out how many of those 30 to 50,000
19 brokers or producers were actually writing Prudential policies?

20 A. I am not at this point.

21 Q. But the total of appointees who were appointed and able to
22 do business by selling Prudential products was that large
23 number, somewhere between 30 and 50,000?

24 A. That is correct.

25 Q. That approximate 30 or 50,000 you testified on direct

D9OJBIN3

Avery - cross

1 examination received commissions?

2 A. If they sold a policy for Prudential, yes.

3 Q. Yes, if they sold a policy and they would be paid -- I
4 believe you testified on direct examination -- that they'd be
5 paid a certain number in the first year of a life insurance
6 policy, correct?

7 A. Correct.

8 Q. And a lesser number in the second year or the other out
9 years from the policy where the premiums are paid?

10 A. That is correct.

11 Q. Are the agents of Prudential, the ones directly employed by
12 Prudential, do they receive commissions?

13 A. Yes, they do.

14 Q. I'll ask the question more broadly now.

15 Do they receive any bonuses of any sort?

16 A. Contracts have changed from time to time. There sometimes
17 are production bonuses or quality bonuses or expense
18 allowances.

19 Q. Have you completed your answer?

20 A. I have. Thank you.

21 Q. If you write a certain amount of business, you might be
22 receiving more compensation? I am talking now about the
23 agents, the employees of Prudential?

24 A. Yes, that is correct.

25 Q. And there would be certain goals set by the sales

D9OJBIN3

Avery - cross

1 departments of Prudential for those agents, correct?

2 A. There are certain targets set, yes.

3 Q. Targets?

4 A. Yes.

5 Q. Would there be any awards for your larger producers? Once
6 again, I am talking just about inside Prudential, the
7 card-carrying Prudential agents?

8 A. Yes, they would be into the top so many would be entitled
9 to go to a conference, a reward conference where there would be
10 further education and reward given, yes.

11 Q. Do you give awards at Prudential functions where they're
12 recognized for the amount of insurance they sell? Again I am
13 talking just about the agents, I'll call them the card-carrying
14 Prudential agents?

15 A. Also when you say "agents," you mean our employee agents?

16 Q. Yes?

17 A. As in most sales agents, there is recognition and reward
18 based on performance, yes.

19 Q. And some of those conferences are in locales that are
20 resorts?

21 A. Generally they're in resorts, yes.

22 Q. In other words, they're in places that people would want to
23 be in?

24 A. To encourage them, yes.

25 Q. Now let's take the brokers-producers.

D9OJBIN3

Avery - cross

1 A. Yes.

2 Q. These are the non-Prudential employees?

3 A. Yes.

4 Q. Now, you've testified that they receive commissions,
5 correct?

6 A. Correct.

7 Q. Do they receive awards of any kind from the company for the
8 number of policies that -- we are talking about life
9 insurance -- the number of life insurance policies that they
10 would write?

11 A. No, there is not.

12 Q. Just straight commissions?

13 A. Generally higher commissions than what the agents get.

14 Q. Are those, are those brokers or producers recognized in any
15 way by the company where you were the CEO of life insurance for
16 their number of policies that they wrote, for their production?

17 A. No.

18 Q. Just straight commission?

19 A. Straight commission.

20 Q. Now, you testified on direct examination that one of the,
21 one of the things about STOLI policies was that it might, the
22 company Prudential might incur losses and lawsuits. Do you
23 recall that testimony on direct examination?

24 A. That is correct, yes, I said that.

25 Q. You said also on direct examination that lawsuits on these

D9OJBIN3

Avery - cross

1 cases have proven to be true? You're prediction about lawsuits
2 has proven to be true? There are many lawsuits that Prudential
3 is involved in, correct?

4 A. There is a handful that Prudential is involved in. I was
5 also predicting them for the industry at the time.

6 Q. Well, let's just take Prudential.

7 A. Yes.

8 Q. There are lawsuits against Prudential by investors who
9 bought policies, correct?

10 MR. FEINGOLD: Objection, your Honor.

11 THE COURT: The objection is sustained. Are we going
12 to get done with this witness before lunch?

13 MR. STAVIS: I am, your Honor. I will be done in just
14 a minute or two.

15 THE COURT: Okay.

16 MR. STAVIS: Maybe three. No more than that.

17 BY MR. STAVIS:

18 Q. Now, you were asked questions about life settlement, and
19 you indicated that Prudential, as required, your testimony was
20 that you can sell a life policy the next day, correct?

21 A. Yes, I did indicate that.

22 Q. It is a fact that a life settlement company would offer
23 more to an insured for a policy than would your company that
24 you were the CEO of life insurance, Prudential?

25 MR. FEINGOLD: Objection.

D9OJBIN3

Avery - cross

1 THE COURT: Sustained.

2 (Off-the-record discussion)

3 BY MR. STAVIS:

4 Q. How do you determine what the cash surrender value would be
5 for a policy?

6 MR. FEINGOLD: Objection, your Honor.

7 THE COURT: The objection is sustained. It is
8 irrelevant. Move on.

9 BY MR. STAVIS:

10 Q. You previously testified the life settlement industry is a
11 billion dollar industry?

12 A. I did not give a number. I just agreed with the gentleman
13 when he purported a number. I know it is large, but I can't
14 attest to what that number is. I am sorry.

15 Q. The large number of people wanting to sell their policies
16 to independent companies as opposed to surrendering them back
17 to Prudential, the company of which you were the CEO in charge
18 of individual life insurance, correct?

19 MR. FEINGOLD: Objection.

20 THE COURT: I will let him answer the question.

21 THE WITNESS: Would you restate the question, please.

22 THE COURT: No, because it is very cumbersome. It is
23 very cumbersome. Get rid of the part about CEO, the whole
24 subordinate clause, and the sentence will be understandable.

25 BY MR. STAVIS:

D9OJBIN3

Avery - cross

1 Q. Of the many people who sold their insurance policies to
2 life settlement companies were people who didn't surrender them
3 to your company even though they had a cash surrender value?

4 A. The many -- I am confused by the question.

5 THE COURT: The question is, if somebody sold the
6 policy to a life settlement company, that means he didn't
7 tender the policy back, surrender it to Prudential, correct?

8 THE WITNESS: It might not have been a Prudential
9 policy, that's correct.

10 THE COURT: These are Prudential policies.

11 MR. STAVIS: Only Prudential policies?

12 THE COURT: In other words, if they sold to the life
13 settlement company, that necessarily meant they weren't giving
14 it back to you for the cash?

15 THE WITNESS: I didn't agree to the many. Those
16 policies that are Prudential policies sold to a life settlement
17 company are obviously not surrendered to Prudential, yes.

18 MR. STAVIS: No further questions.

19 THE COURT: How much do you have?

20 MS. MURRAY: 15 minutes.

21 THE COURT: We are going to take a lunch break. We
22 will see you folks back at 5 after 2:00. Don't discuss the
23 case. Keep an open mind.

24 (Jury excused)

25 MR. STAVIS: Your Honor?

D9OJBIN3

Avery - cross

1 THE COURT: Yes.

2 MR. STAVIS: I would object to that portion of your
3 Honor's ruling --

4 THE CLERK: Stay seated.

5 MR. STAVIS: -- I would object to that portion of your
6 Honor's ruling which did not allow me to elicit the lawsuits
7 that were the subject of the direct examination.

8 THE COURT: You have an exception to every single one
9 of my rulings that goes against you. That is the way this game
10 is played. So you have your exception.

11 I don't sit here and say overruled, you have your
12 exception; sustained, you have your exception. You have your
13 exception. I understand what you are trying to get at. I
14 concluded it is irrelevant. You have your exception.

15 MR. STAVIS: Thank your Honor.

16 (Luncheon recess)

17 (Continued on next page)

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D9OJBIN3

Avery - cross

1 AFTERNOON SESSION

2 2:10 pm

3 (Trial resumes)

4 (In open court; jury not present)

5 THE COURT: Okay. See if they all got back, that's
6 the question. The lines are so long. Let's get the witness
7 back.

8 THE CLERK: We are down a juror.

9 (Jury present)

10 THE CLERK: Remain seated.

11 THE COURT: You're still under oath. Ms. Murray.

12 CROSS-EXAMINATION

13 BY MS. MURRAY:

14 Q. Good afternoon, Mr. Avery.

15 A. Good afternoon.

16 Q. Prudential today is the second largest life insurer in the
17 world, correct?

18 THE COURT: You're big, right?

19 THE WITNESS: It depends on how you measure it, but
20 I'll say yes.

21 BY MS. MURRAY:

22 Q. I'm quoting from your own web site, sir. You wouldn't
23 dispute that characterization?

24 A. No, I would not.

25 Q. Back when you were president of the life insurance U.S.

D9OJBIN3

Avery - cross

1 Division, was it also the second largest life insurer in the
2 world?

3 A. Yes.

4 Q. Today Prudential has approximately 1.044 trillion dollars
5 in assets under management. Would it be a similar figure back
6 in the period of 2006 to 2009?

7 A. It would be in that range, yes.

8 Q. And today Prudential has 3.4 trillion in gross life
9 insurance worldwide. Again would that be close to the figure
10 back in --

11 MR. FEINGOLD: Objection, your Honor. I apologize for
12 not waiting for Ms. Murray to finish.

13 THE COURT: That is okay. We can find out how big Pru
14 is. We can --

15 THE WITNESS: Yes.

16 BY MS. MURRAY:

17 Q. Today Prudential has 48,000 employees. Would that also be
18 fairly equivalent to the number of employees that Prudential
19 had back in 2006 to 2009?

20 A. It has changed over time from various mergers, acquisitions
21 and dispositions, but it is in that range.

22 Q. Do you know how many actuaries were in the company back in
23 2006 to 2009?

24 A. No, I cannot quote the number.

25 Q. The actuary is the individual who analyzes financial risk,

D9OJBIN3

Avery - cross

1 correct?

2 A. The actuaries have many functions within an insurance
3 company.

4 Q. One of their functions is to analyze the consequences and
5 likelihood of financial risk?

6 A. Yes, some part of it. Others do as well, not just
7 actuaries.

8 Q. Would it be fair that the actuaries develop models to
9 analyze risk?

10 A. Yes.

11 Q. And they use mathematics, economics, statistics, financial
12 theory, among other things, to develop those models?

13 A. Yes.

14 Q. The actuary profession is a very small profession
15 worldwide. Is that fair to say?

16 A. That's correct.

17 Q. About 50,000 people in total?

18 A. I don't know the number, but it is small.

19 Q. You can't actually get to be an accredited actuary at a
20 university. Is that right?

21 A. No. You have to pass exams passed by the Society of
22 actuaries.

23 Q. And those are very difficult exams, would that be fair to
24 say?

25 A. Yes, that is fair.

D9OJBIN3

Avery - cross

1 Q. Would it be fair to say -- and I don't mean to pander to
2 you, Mr. Avery -- but actuaries are among the smart people in
3 the room, would that be fair to say?

4 A. Some people would say that.

5 THE COURT: Probably actuaries.

6 THE WITNESS: I will take the Fifth on that.

7 BY MS. MURRAY:

8 Q. Back in 2005, Prudential certainly knew about the life
9 settlement industry at that point, right?

10 A. Yes. Prudential --

11 Q. I am sorry.

12 A. -- Prudential was one of the first to allow people who were
13 close to death actually to get their death benefit, which is a
14 part of viatical settlements.

15 Q. And at the time in 2005, Prudential knew that it was a huge
16 growth industry worth billions of dollars a year, correct, the
17 life settlement industry?

18 A. I don't believe it was that big back then, so I would not
19 agree with that.

20 Q. But it was a growth industry at that time, would you agree?

21 A. It was more a growth industry at the onset of the AIDS
22 epidemic and a declining industry when various medical protocol
23 came into place to help AIDS patients, who actually suffered a
24 downward trend after that.

25 THE COURT: If you would just get a little closer to

D9OJBIN3

Avery - cross

1 or lift up that microphone, I would appreciate it.

2 THE WITNESS: All right.

3 BY MS. MURRAY:

4 Q. Prudential was aware in 2005 there was a new market for the
5 life settlement industry which was senior policies. Is that
6 right?

7 A. We became aware when the life settlement industry went into
8 a decline because of the improvement of AIDS patients'
9 outlooks, we became aware through various marketing efforts, as
10 I testified earlier, that the settlement industry itself was
11 growing, and these new STOLI-type marketing techniques would
12 fuel growth in that business, and that is when we became aware
13 of STOLI, yes.

14 Q. You became aware of STOLI in 2005 as well?

15 A. 2004, 2005, somewhere in that time-frame, yes.

16 Q. And the potential of STOLI to result in growth in the life
17 settlement industry, correct?

18 A. That is correct.

19 Q. Now, you did touch briefly on this on cross, but there are
20 two, the two most common forms of life insurance, would you
21 agree, could be divided into temporary versus permanent. Would
22 you agree with that?

23 A. That is a fair separation, yes.

24 Q. The temporary one, forms of life insurance would include
25 term life insurance, the one most of us would be familiar with,

D9OJBIN3

Avery - cross

1 correct?

2 A. That is the temporary one, yes.

3 Q. And that is where one takes on an insurance policy for a
4 set period of time, 10, 20 or 30 years, correct?

5 A. That's correct.

6 Q. And the purpose in taking on this type of insurance is to
7 provide for a death benefit in the unlikely eventuality of an
8 early death, would that be fair to say typically?

9 A. Typically, yes.

10 Q. So that if a working parent, for example, passed away
11 unexpectedly in their 30's, 40's or 50's and still had young
12 children, it would be term life insurance to provide for
13 education and pay off --

14 A. Yes.

15 Q. It is called temporary because the assumption is that the
16 person will outlive the policy, right?

17 A. No. The assumption is that some people will die during
18 that period of time and some won't, and some do.

19 (Continued on next page)

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D9OLBIN4

Avery - cross

1 BY MS. MURRAY:

2 Q. The purpose in buying the term -- the purpose of a consumer
3 in buying it is to buy piece of mind and ultimately, hopefully,
4 outlive the policy. Would that be fair to say?

5 A. I think it would be fair to say most insureds would like to
6 outlive their policy, yes.

7 Q. The other form of insurance is permanent insurance,
8 correct?

9 A. Yes, that is a classification, yes.

10 Q. And whole life and universal life policies are examples of
11 permanent insurance?

12 A. That is correct.

13 Q. And this is insurance that is not intended to end at a
14 particular point but is actually intended to go to death,
15 correct?

16 A. If you pay the premiums till death, yes, or keep them
17 funded, yes.

18 Q. And as Prudential markets it, it's designed to last as long
19 as you live, correct?

20 A. As long as you live and as long as you desire it to last.

21 Q. But you don't market it as a benefit designed to last until
22 you lapse, you don't market it that way, do you?

23 A. No.

24 Q. Now, you stated on direct that one of the factors that
25 actuaries take into account in pricing is -- in pricing

D9OLBIN4

Avery - cross

1 universal life policies, these permanent life insurance
2 policies, are the lapse rates?

3 A. Yes, I did.

4 Q. This means looking at the prior experiences of lapses and
5 then factoring that into these future assumptions, correct?

6 A. Yes, I did.

7 Q. And STOLI -- sorry. Withdrawn.

8 Isn't it a fact, Mr. Avery, that relying on lapse
9 rates to price products is actually deemed not good actuarial
10 practice?

11 A. No, it's deemed appropriate. I disagree.

12 Q. Isn't it a fact that actuaries generally believe that
13 relying on lapse rates is inappropriate, is inadvisable because
14 lapse rates are so unpredictable?

15 A. No, I'm sorry. I don't agree with you.

16 Q. Okay. And, in fact, lapse rates are subject to economic
17 forces and for that reason are hard to predict?

18 A. I think under the rule of statistics in mathematics, when
19 you have a large group of people, the data becomes more
20 predictable and it's predictable over various economic cycles
21 and employment cycles. We're not new to those cycles.

22 Q. Isn't the most predictable thing death?

23 A. The most predictable thing?

24 Q. From an actuarial standpoint.

25 A. I'd say, again, law of large numbers, it becomes more

D9OLBIN4

Avery - cross

1 predictable because of the size of the population you get in
2 the study. But I don't know that it's more predictable. There
3 are many things that you predict or assume.

4 Q. Now, you said on direct that STOLI changes the assumptions
5 that actuaries and underwriters are making about lapse rates,
6 correct?

7 A. No, I don't think I said that.

8 Q. Would it be fair to say that STOLI changes the assumptions
9 that actuaries would use regarding lapse rates in pricing
10 universal life policies?

11 A. We don't price for STOLI because we didn't want it. So we
12 didn't price for it; that's why I objected to the question. If
13 we were desired to sell STOLI, then you would, just like any
14 business that would behave differently, you would price it
15 based on the behavior of that class of policies. But since we
16 did not intend to write STOLI, the actuaries did not price
17 STOLI or lapse rates differently for STOLI.

18 Q. But you were pricing the policies based on prior lapse
19 rates in part, correct?

20 A. That is correct.

21 Q. And STOLI would undermine the assumptions you might have
22 made about prior lapse rates, correct?

23 A. If STOLI had crept into the data, it would be in the data.
24 Again, STOLI is a rather new phenomenon, so it would be
25 somewhat limited in our experience until time went on and if

D9OLBIN4

Avery - cross

1 more policies got through the screens that we had in place,
2 yes.

3 Q. So in 2005, when you knew that STOLI was appearing and
4 there was a growing life settlement industry, it will be fair
5 to say that past experience about lapse rates did not
6 necessarily predict future experience about lapse rates,
7 correct?

8 A. I'm not sure I understand the question.

9 Q. In 2005, when you were aware that STOLI was potentially
10 creeping in, Prudential knew that prior experience about lapse
11 rates was not necessarily predictive of future lapse rates; is
12 that right?

13 A. No. In 2005, we became aware of STOLI because producers
14 who wanted to do it brought it to us as an opportunity. We
15 declined the opportunity.

16 So at that time we would not be assuming that we would
17 be getting STOLI. We started to get it when it was disguised
18 and we couldn't identify it as easily as we had hoped.

19 Q. And in 2005, you were aware of the potential that you could
20 be getting STOLI, right?

21 A. Quite frankly, back in 2005, we thought this would go away
22 because it was not legal.

23 Q. Now, the policies at issue here were sold to individuals
24 older than 70 years of age?

25 A. No, I'd say we sold policies anywhere from generally age 60

D9OLBIN4

Avery - cross

1 on up, not always over age 70.

2 Q. And these universal life policies were being marketed to
3 senior citizens, correct?

4 A. Universal life is marketed to senior citizens, yes.

5 Q. Now, while many people buy life insurance hoping to outlive
6 the policy or not to die soon, many in this group are buying it
7 with the purpose of preparing for death rather than insuring
8 against it; would that be fair to say?

9 A. I'd say at the older ages, it's more estate planning. So
10 it's preparing for potential death, yes.

11 Q. We saw on direct the policy of Florra Adler -- and I won't
12 ask to show it again -- where the purpose of the policy, the
13 purpose of the policyholder in getting the policy was listed as
14 preparing for death and estate conservation?

15 A. Estate conservation, yes.

16 Q. Now, you also said on direct it's important to you that
17 senior citizens are not being sold something they can't afford,
18 right?

19 A. That is correct.

20 Q. And the --

21 A. All policyholders, not just senior citizens.

22 Q. Right. And the pricing of the universal life policies, the
23 pricing of premiums gets higher as the person is older,
24 correct?

25 A. That is correct.

D9OLBIN4

Avery - cross

1 Q. And so for people in their seventies buying these policies,
2 the premiums can be anything from a hundred thousand dollars up
3 to several hundred thousand dollars a year, correct?

4 A. Depends on their age and face amount, but they can be
5 large, yes.

6 Q. And you have built lapses, the expectation of some lapses
7 into the pricing for those policies, right?

8 A. Correct.

9 Q. In other words, you're selling these permanent life
10 insurance policies to people in their seventies and late
11 seventies for very huge premiums and Prudential is hoping that
12 several of them will lapse, correct?

13 A. No, we're not hoping. We're basing it on experience of
14 what they actually do. It's not a hope.

15 Q. Prudential is anticipating that several of these will
16 lapse, correct?

17 A. Anticipating it based on experience, yes.

18 Q. And when that happens, Prudential actually pockets all the
19 premiums that have been paid to date, correct?

20 A. No.

21 Q. No.

22 A. The reason being, if you look at the premium versus the
23 death benefit, as I said before, maybe the example I'd give, if
24 you had ten people who wanted -- each of them say when I die, I
25 want \$100. The insurance company anticipates that only one

D9OLBIN4

Avery - cross

1 will die while they own the policy. They would charge each of
2 the ten people \$10 and the insurance company would have \$100.
3 And when that one person dies, the hundred dollars is
4 available.

5 So the other people who paid the \$10 in, it's not
6 profit. That's where the money comes from to pay the claim,
7 just like in auto insurance and fire insurance. Our premiums
8 are never equal to the benefit. They're less based on
9 experience. So lapses is one of the experience factors, and
10 policies do lapse at the older ages.

11 Q. But Prudential will sell these policies to people when
12 they're 75 years old, 78 years old, correct?

13 A. If they have the need for it, yes.

14 Q. And if that person lapses several years later with respect
15 to that individual policy, those premiums are not returned to
16 that individual when they decided to lapse, correct?

17 A. The premiums are not returned, but they may have a cash
18 value depending on the contract.

19 Q. But the minimum premium on many of these policies could be
20 several hundred thousand, correct?

21 MR. FEINGOLD: Objection, asked and answered.

22 THE COURT: The objection is sustained.

23 Q. The minimum payment will not go towards any cash value,
24 would that be fair to say, Mr. Avery?

25 A. I'll try to answer the question.

D9OLBIN4

Avery - cross

1 THE COURT: I think you mean it doesn't increase the
2 cash value of the policy?

3 Q. If one is simply paying the minimum premium to maintain the
4 death benefit, that is not increasing the cash value of the
5 policy?

6 THE COURT: Does that cause the cash value of the
7 policy to increase?

8 THE WITNESS: It can cause the cash value of the
9 policy to temporarily increase. But with time, if they
10 continue to pay the premium, it will go up and back down and
11 essentially go to zero. But in early years, it might increase
12 the cash value. That's why I said, yes, it did.

13 Q. Are you familiar with the National Association of Insurance
14 Commissioners?

15 A. I am.

16 Q. And what is it?

17 A. It's insurance is regulated at the state level, so it is
18 actually regulated by each of the 50 states. It's not
19 federally regulated the way the banks can be. And each state
20 has an insurance commissioner who is in charge of regulation of
21 insurance in that state, either elected or appointed. And they
22 come together as a group under the auspices of National
23 Association of Insurance Commissioners and they promulgate,
24 where they can, common legislation and regulation.

25 Q. And so they promulgate these model regulations; would that

D9OLBIN4

Avery - cross

1 be fair to say?

2 A. That is correct.

3 Q. And different states will adopt many of these model
4 regulations, right?

5 A. Yes, that's correct.

6 Q. And are you familiar with the life insurance illustration
7 model regulation?

8 A. Somewhat, yes.

9 Q. And this is -- an illustration is a depiction of
10 nonguaranteed elements of a life insurance policy over a period
11 of years; would that be a correct description of what an
12 illustration is?

13 A. That's one form. There are illustrations for policies
14 other than that. But, yes, they illustrate the policy, how it
15 might perform under a set of assumptions.

16 Q. And in the universal life context, the illustration could
17 depict the growth of the cash value of the policy over a period
18 of years?

19 A. Depending on the premium, as you've stated earlier, that's
20 assumed to be funded into the policy, it will depict all
21 aspects of the policy, cash value and death benefit.

22 Q. Would you agree with the statement that the purpose of the
23 model regulation for life insurance policy illustrations is
24 that it will protect the consumer and foster consumer
25 education?

D9OLBIN4

Avery - cross

1 MR. FEINGOLD: Object to form and relevance, your
2 Honor.

3 THE COURT: The objection to relevance is sustained.
4 It's sustained.

5 MS. MURRAY: Your Honor, I can have a side bar.

6 THE COURT: Objection is sustained. Move on, please.

7 Q. And are you aware, Mr. Avery, that the model regulation on
8 life insurance illustration prohibits the use of illustrations
9 that are lapse supported?

10 MR. FEINGOLD: Objection, relevance.

11 THE COURT: Same objection. Same ruling.

12 Q. Would it be fair to say, Mr. Avery, that Prudential does
13 not announce to its customers, its potential insureds, that it
14 has factored lapse rates into the pricing of its products?

15 MR. FEINGOLD: Objection, relevance, your Honor.

16 THE COURT: Objection is sustained.

17 Q. Now, Mr. Avery, on direct you said that mortality rates are
18 impacted by net worth; is that correct?

19 A. No. I think the answer I gave was indirectly they can be.

20 Q. In other words, does Prudential take the position that
21 people with a higher net worth have a lower mortality?

22 A. We don't take that position. Our mortality studies would
23 indicate what mortality we get based on size of face amount,
24 and if you think about face amount as related to net worth,
25 that's the indirect aspect of it.

D9OLBIN4

Avery - cross

1 Q. Now, the people who are getting the universal life policies
2 in their seventies are also on Medicare, correct?

3 MR. FEINGOLD: Objection.

4 THE COURT: The objection is sustained.

5 Q. The individuals getting these universal life insurance
6 policies in their seventies, Mr. Avery, undergo very rigorous
7 medical underwriting; is that right?

8 A. Yes. There are different standards for underwriting based
9 on face amount and age, so it differs by all ages.

10 Q. And in connection with that medical underwriting, not only
11 is a detailed medical history of the individual taken, but also
12 information about the cause of death of siblings and parents,
13 correct?

14 A. We get that in most ages, not just age 70 and above.

15 Q. I'm just going to focus my questions on universal life
16 policies at issue in this case.

17 A. Okay.

18 Q. In addition, Prudential is able to request additional
19 medical tests of the individuals proposing to be insured,
20 correct?

21 A. Certain tests we are permitted, yes.

22 Q. And isn't it a fact, Mr. Avery, that there are no insurance
23 studies indicating that the healthiest of the rich have a
24 better mortality than the healthiest of people of modest means?

25 MR. FEINGOLD: Objection, your Honor.

D9OLBIN4

Avery - cross

1 THE COURT: Overruled.

2 A. I can only say I'm aware that there are studies of
3 mortality by face amount. I don't know --

4 Q. You're aware of studies of mortality by face amount?

5 A. Death benefit issued, yes.

6 Q. And these mortality studies of face amount indicate that
7 people with high face amounts on the policies will live longer;
8 is that right?

9 A. Those studies indicate whatever the data suggests. At
10 times, it has suggested better mortality on the higher face
11 amounts, but it does change over times as medical science has
12 evolved.

13 Q. And these policies do not analyze -- these studies have not
14 analyzed the net worth of the individuals involved in those
15 studies, correct?

16 A. The studies I'm familiar with have not.

17 MS. MURRAY: I have no further questions for this
18 witness.

19 THE COURT: Thank you.

20 MR. FEINGOLD: Very brief redirect, your Honor?

21 THE COURT: Sure.

22 REDIRECT EXAMINATION

23 BY MR. FEINGOLD:

24 Q. Mr. Avery, Ms. Murray just asked you a lot of questions
25 about mortality studies of high face amount life insurance

D9OLBIN4

Avery - redirect

1 policies. Are you referring to four or \$5 million life
2 insurance policies?

3 A. The studies I've seen generally look at a million dollars
4 and above as the classification, the ones I'm familiar with
5 again.

6 Q. And for this range of policies, what's the expectation as
7 to the true net worth of those insureds?

8 A. It's always assumed, since we wouldn't sell large policies
9 to people that didn't have some net worth equivalent to that,
10 that they would be large.

11 Q. So \$4 million for 4 million policy or thereabouts?

12 A. Yeah. So that's my comment of indirect.

13 Q. Now, Mr. Abramowitz asked you some questions about the
14 bargain that Prudential is entering into when it issued a life
15 insurance policy; do you recall those questions?

16 A. Yes.

17 Q. Now, was part of the bargain that Prudential was entering
18 into insuring the risk that you knew about?

19 A. Yes. Yes.

20 Q. Was part of the bargain insuring the risk that you had
21 truthful information about?

22 A. Absolutely.

23 Q. Was part of the bargain issuing a policy --

24 MR. STAVIS: Objection as to form, your Honor.

25 THE COURT: I haven't heard the rest of the question.

D9OLBIN4

Avery - redirect

1 Q. What part of the bargain, if any, did issuing a policy
2 based on truthful information have?

3 A. The entire bargain.

4 Q. Now, you heard a lot of questions about Prudential
5 employees, agents, producers, brokers.

6 Did Prudential expect its employees to abide by
7 Prudential's policy and position of not issuing STOLI policies?

8 A. Absolutely.

9 Q. Did Prudential expect its agents, producers, and brokers to
10 abide by Prudential's policy of not issuing STOLI policies?

11 A. Yes. We terminated any agent or broker that we thought was
12 doing those transactions.

13 Q. Did you rely on brokers, producers, and agents to provide
14 Prudential with truthful and accurate information about their
15 clients and the applicants for life insurance policies?

16 A. Absolutely.

17 Q. Did Prudential have concerns about the bottom line being
18 impacted by issuing policies that are intended to be sold
19 immediately upon issuance?

20 MR. STAVIS: Objection as to form, your Honor.

21 THE COURT: Objection is sustained. Stop asking
22 argumentative and leading questions.

23 Q. Mr. Avery, what would happen if every universal life policy
24 that Prudential issued had the premiums paid until the insured
25 died?

D9OLBIN4

Avery - redirect

1 MR. STAVIS: Objection as to form, your Honor.

2 THE COURT: Overruled.

3 MR. STAVIS: Hypothetical being proposed to the
4 witness.

5 THE COURT: That's just fine.

6 Q. Do you remember the question?

7 A. Yes. Given that we take into account lapsation and
8 surrender of life insurance policies, if every policy we issued
9 never lapsed, never surrendered, the insurance company would
10 lose millions and millions of dollars and it would have to, as
11 soon as it started to experience that, since we base pricing on
12 experience, we would have to significantly raise prices going
13 forward.

14 Q. What would happen to Prudential's business if it had to
15 significantly raise prices for its customers?

16 MR. ABRAMOWITZ: Objection, your Honor.

17 THE COURT: I'm sorry?

18 MR. ABRAMOWITZ: Objection.

19 THE COURT: Ground?

20 MR. ABRAMOWITZ: It's hypothetical.

21 THE COURT: Answer the question.

22 THE WITNESS: Thank you. Could you ask the question
23 again.

24 Q. Certainly. What would happen to Prudential's business if
25 Prudential had to significantly raise its prices for its

D9OLBIN4

Avery - redirect

1 insurance customers?

2 A. Two part answer: One, it depends whether the competition
3 is similarly raising prices. Secondarily, without that,
4 business would decline because insurance would become less
5 affordable for citizens who want to insure their risk and
6 that's one of our concerns.

7 MR. FEINGOLD: One moment, your Honor.

8 No further questions.

9 MR. ABRAMOWITZ: May I have a minute, your Honor?

10 THE COURT: Sure.

11 MR. ABRAMOWITZ: No further questions.

12 MR. STAVIS: No further questions, your Honor.

13 THE COURT: You're through, sir.

14 THE WITNESS: Thank you.

15 (Witness excused)

16 MS. CHOI: Your Honor, the government calls Steven
17 Espinal to the stand.

18 STEVEN ESPINAL,

19 called as a witness by the Government,

20 having been duly sworn, testified as follows:

21 DIRECT EXAMINATION

22 BY MS. CHOI:

23 Q. Good afternoon, Mr. Espinal.

24 A. Good afternoon.

25 Q. How old are you?

D9OLBIN4

Espinal - direct

1 A. Forty-five.

2 Q. Where do you live?

3 A. Cliffside Park, New Jersey.

4 Q. Do you live with anyone?

5 A. Yes.

6 Q. Who do you live with?

7 A. My girlfriend, her niece, and her brother.

8 Q. Do you work?

9 A. Yes.

10 Q. Where do you work?

11 A. In Fort Lee, New Jersey.

12 Q. And what do you do for a living?

13 A. I work as a doorman.

14 Q. And where specifically do you work as a doorman?

15 A. In Fort Lee, New Jersey, a building called The Plaza.

16 Q. How long have you worked there?

17 A. Approximately 21 years.

18 Q. Mr. Espinal, are you testifying here today pursuant to an
19 agreement with the government?

20 A. Yes, I am.

21 MS. CHOI: Your Honor, may I approach?

22 THE COURT: Yes.

23 Q. Mr. Espinal, could you please take a look at the document I
24 just placed before you which has been marked Government
25 Exhibit 4006. Do you recognize that document?

D9OLBIN4

Espinal - direct

1 A. Yes, I do.

2 Q. Is it a copy of your agreement with the government?

3 A. Yes, it is.

4 Q. Do you have an understanding of what that agreement
5 requires you to do?

6 A. Yes, I do.

7 Q. And what's that understanding?

8 A. To tell the truth on this court.

9 Q. And do you have an understanding what the government has to
10 do in return under that agreement?

11 A. Yes.

12 Q. And what's that?

13 A. Provided that I tell the truth, it's a nonprosecution
14 agreement.

15 Q. And do you have an understanding what would happen to you
16 if you were to lie under that agreement?

17 A. This agreement would become null and void.

18 Q. And could you be separately prosecuted if you were to not
19 tell the truth?

20 A. Yes.

21 Q. Okay. If you could put that document aside.

22 Mr. Espinal, what is your mother's name?

23 A. Martha Espinal.

24 Q. How old is she?

25 A. Eighty-five years old.

D9OLBIN4

Espinal - direct

1 Q. And what language does she usually speak?

2 A. Spanish.

3 Q. How well does Mrs. Espinal speak English?

4 A. Not well.

5 Q. Where does she live?

6 A. In Cliffside Park, New Jersey.

7 Q. Could you describe the building that she lives in, the type
8 of building she lives in?

9 A. She lives in senior citizen housing.

10 Q. How much does she pay in rent per month?

11 A. Approximately \$220.

12 Q. Does she receive any assistance to pay for that rent?

13 A. Yes.

14 Q. What kind of assistance?

15 A. Social security income.

16 Q. And do you know if her rent is subsidized at all?

17 A. Yes, it is.

18 Q. And why does she receive that subsidy?

19 A. It's based on her age and her financial income.

20 Q. How long has she lived in that senior citizen housing
21 complex?

22 A. Approximately ten years plus.

23 Q. And how far away do you live from your mother?

24 A. A few blocks.

25 Q. Do you have an understanding of your mother's finances?

D9OLBIN4

Espinal - direct

1 A. Yes, I do.

2 Q. Does your mother have any sources of income?

3 A. No.

4 Q. Other than social security income?

5 A. Other than social security income, no, ma'am.

6 Q. How much does she make in social security income per month,
7 do you know?

8 A. Approximately 720 a month.

9 Q. At any time between 2007 to the present, had your mother
10 had any significant assets?

11 A. No.

12 Q. And at any time between 2007 to the present, has your
13 mother owned any property?

14 A. No, she has not.

15 Q. And at any time between 2007 to the present, has your
16 mother had any investments?

17 A. No.

18 Q. Does your mother own a bank account?

19 A. Yes.

20 Q. Do you have access to that bank account?

21 A. Yes, I do.

22 Q. And between 2007 to the present, how much did your mother
23 have in that bank account on average per month?

24 A. Approximately \$700.

25 Q. Do you know an individual named Michael Binday?

D9OLBIN4

Espinal - direct

1 A. Yes, I do.

2 Q. Have you spoken with him previously?

3 A. Previously, yes.

4 Q. And how many times have you met him in person?

5 A. Once.

6 Q. Do you see Mr. Binday in the courtroom today?

7 A. Yes, I do.

8 Q. Could you point out Mr. Binday?

9 A. The gentleman with the glasses, I believe the bluish tie.

10 MR. ABRAMOWITZ: Identification conceded, your Honor.

11 THE COURT: Indicating Mr. Binday.

12 Q. Do you know an individual named Janice Greenbaum?

13 A. Yes.

14 Q. And how did you first meet Janice Greenbaum?

15 A. Through purchasing an insurance policy for myself and my
16 mother.

17 Q. And what kind of insurance policy was that?

18 A. Life insurance policy.

19 Q. And what was the face value, if you recall, of those life
20 insurance policies for yourself and your mother?

21 A. Approximately a hundred thousand.

22 Q. And are those real life insurance policies?

23 A. Yes.

24 Q. Now, at some point after you got those life insurance
25 policies, did you have another conversation with Janice

D9OLBIN4

Espinal - direct

1 Greenbaum about another type of life insurance?

2 A. Yes.

3 Q. Could you describe that conversation?

4 A. It was a conversation in reference to an insurance policy
5 called alternate -- alternate insurance policy.

6 Q. And what was your understanding of what alternate life
7 insurance policy would be?

8 A. A policy that is placed on your parents or -- a life policy
9 placed on your parents that you do not pay for and the policy
10 then gets sold and then you're paid a premium or between two
11 and 8 percent of what the policy was to be sold at.

12 Q. Did you have an understanding of how much you could receive
13 under such a plan?

14 A. I was, yes, I did.

15 Q. And what was that understanding?

16 A. I was told it could be anywhere from two, four, six or
17 8 percent of what the policy sells for.

18 Q. And how large were those life insurance policies for, do
19 you know?

20 A. Approximately 3 million.

21 Q. And after you had -- after Janice Greenbaum explained this
22 to you, what did you say in response to her?

23 A. How can I proceed with applying for the policy.

24 Q. And what did she say to you?

25 A. It's an application that you would have to fill out to be

D9OLBIN4

Espinal - direct

1 qualified for it.

2 Q. And did you talk to anyone else after this conversation
3 about the alternative life insurance policy?

4 A. Yes.

5 Q. Who did you speak with?

6 A. Gentleman by the name of Michael Binday from Advocate
7 Brokerage.

8 Q. And what did he say to you?

9 A. He would send me the application packet in order to apply
10 for the policy.

11 Q. And did he describe the process, the process about
12 alternative life insurance policies to you?

13 A. Yes.

14 Q. And was that process similar to what Ms. Greenbaum had
15 explained to you?

16 A. Yes, it was.

17 Q. Did you have an understanding about how premiums were going
18 to be paid for under this alternative life insurance program?

19 A. No, I did not.

20 Q. Did you think that your mother was going to have to pay for
21 them?

22 A. She -- no. I was told that I -- I or my mother would not
23 have to pay for them.

24 Q. And did you have an understanding of when you would receive
25 money under this alternative life insurance program?

D9OLBIN4

Espinal - direct

1 A. I was told once the policy is sold, I would receive either
2 two to 8 percent of what the policy was sold at.

3 Q. Did you talk to your mother about this program?

4 A. Yes, I did.

5 Q. And what did she say, what did you two discuss?

6 A. I explained to my mother what the policy was about and she
7 also agreed and thought it would be a good idea.

8 Q. And why did you and your mother want to go through with
9 participating in this program?

10 A. Myself and my mom also thought it would be a good way to
11 provide for the family.

12 Q. Was there something specific that you wanted to use that
13 money for --

14 A. Yes.

15 Q. -- if a policy were to be sold. And what was that?

16 A. First reason was to provide for a burial plot for my mother
17 when she did pass in the future and also to go on vacation and
18 buy a few things for my mother that she needed.

19 Q. So did you and your mother decide to go forward with trying
20 to get these policies?

21 A. Yes.

22 Q. And so could you describe generally how the process worked?

23 A. I received in the mail at my place of where I work a UPS
24 envelope with an application inside. That application had
25 little stickie notes, Post-it notes on areas where my mother

D9OLBIN4

Espinal - direct

1 needed to sign, and then that would be mailed back in a prepaid
2 UPS envelope next day.

3 Q. And prior to receiving these packages, would you have any
4 communications with Advocate Brokerage?

5 A. Yes.

6 Q. And who would you talk to?

7 A. Person by the name of Janet Bilbao.

8 Q. Did you also talk to Mr. Binday?

9 A. Yes.

10 Q. And would they let you know that a package was coming in
11 the mail?

12 A. Yes.

13 MR. ABRAMOWITZ: Object to form.

14 THE COURT: I'm sorry?

15 MR. ABRAMOWITZ: Would they let you know which one.

16 THE COURT: Want to rephrase it?

17 Q. Would Ms. Bilbao let you know that a package was coming in
18 the mail?

19 A. Yes.

20 Q. And would sometimes Mr. Binday let you know that a package
21 was coming in the mail?

22 A. If I recall correctly, yes.

23 Q. And would you typically have to fill out the entire life
24 insurance application or just parts of the application?

25 A. Parts of the application.

D9OLBIN4

Espinal - direct

1 Q. And aside from the application forms themselves, did you or
2 your mother have to do anything else in order to apply for
3 these alternative life insurance policies?

4 A. Yes.

5 Q. What was that, sir?

6 A. It was requirement of a physical by a doctor that came to
7 the house and gave my mother a physical.

8 MS. CHOI: Your Honor, may I approach?

9 THE COURT: Yes.

10 Q. Mr. Espinal, I've given you what's been marked as
11 Government Exhibit 703 for identification purposes. Could you
12 tell me what this document is?

13 A. It's a document marked Advocate Brokerage from Mr. Binday's
14 office.

15 Q. And who is it sent to?

16 A. Myself.

17 Q. And what's the date on it?

18 A. September 14, 2007.

19 Q. And do you see the initials in the bottom left-hand corner
20 of that document?

21 A. Yes.

22 Q. And whose initials are those?

23 A. They're my initials.

24 Q. And when did you initial this document?

25 A. When I met with you.

D9OLBIN4

Espinal - direct

1 Q. And where did this document originally come from?

2 A. From Advocate Brokerage.

3 Q. And did you have it in your possession at some time after
4 that?

5 A. Yes.

6 MS. CHOI: The government offers Government
7 Exhibit 703 into evidence.

8 MR. ABRAMOWITZ: No objection.

9 MS. CHOI: Ms. Hayakawa, could you please publish
10 GX703 -- I'm so sorry, your Honor.

11 THE COURT: Admitted.

12 (Government's Exhibit 703 received in evidence)

13 MS. CHOI: Could you please publish Government
14 Exhibit 703 for the jury.

15 Q. Mr. Espinal, could you read the re line of that document
16 for the jury.

17 A. Excuse me?

18 Q. Could you read the line that's just on the screen right
19 now, the re line for the jury.

20 A. Martha Espinal, AIG New Jersey, 3MM application forms for
21 signature.

22 MS. CHOI: Ms. Hayakawa, could you zoom out and then
23 zoom in on the text of the letter, please.

24 Q. Mr. Espinal, could you read out loud the first paragraph of
25 the cover letter including the bold language.

D9OLBIN4

Espinal - direct

1 A. Per our phone conversation, enclosed please find an AIG New
2 Jersey application, HIV and HIPPA forms, financial
3 questionnaire, and premium financing form. New Jersey does not
4 have or require a definition or replacement form. Please have
5 Martha sign in all sections highlighted in yellow. Do not date
6 forms.

7 Q. Could you read out loud that second paragraph as well.

8 A. Included is the signature page for the trust. Please have
9 Martha sign as the settlor. Do not date form.

10 Q. And could you read out loud that third paragraph.

11 A. Finally, please have Martha sign the illustration as the
12 applicant. Do not date form.

13 Q. And could you read that last line, the last two lines of
14 the letter, please.

15 A. If you have any questions, please call me at (914) 723-7100
16 extension 130. Please return completed forms to me in the
17 enclosed self-addressed overnight envelope. Thank you.

18 Q. What did you do once you received this cover letter and the
19 application beneath it?

20 A. I followed the instructions. My mother signed in the
21 indicated areas and they were mailed in the UPS provided
22 envelope the next day.

23 Q. Now, the rest of the document that's attached to this cover
24 letter, is this a copy of the original application you received
25 from the office or is it the original?

D9OLBIN4

Espinal - direct

1 A. It's the rest of the letter are copies.

2 Q. And did the original version of the application that you
3 received from Advocate Brokerage contain the highlighting as
4 referenced in the letter?

5 A. Excuse me?

6 Q. Did the original version of the application that you
7 received from Advocate Brokerage contain highlighting as it's
8 referenced in the letter?

9 A. Yes, I believe so.

10 Q. All right. Why don't we take a look at this application.

11 MS. CHOI: Ms. Hayakawa, could you pull up page 2 on
12 to the screen.

13 Q. Now, Mr. Espinal, do you recognize the handwriting in the
14 section of the document that says personal information at the
15 top of the page?

16 A. The only writing I recognize is the address of my mother.

17 Q. Okay. And whose handwriting is that?

18 A. My mother's -- my handwriting, 550 Gorge Road, Apartment
19 3F.

20 Q. And Cliffside Park, New Jersey?

21 A. Yes. And Cliffside Park, New Jersey, Apartment 3F.

22 Q. For the other parts of that section, do you recognize the
23 handwriting as it appears there?

24 A. No, I do not.

25 Q. Were those sections filled in when you got these forms?

D9OLBIN4

Espinal - direct

1 A. Yes.

2 Q. Drawing your attention to the line -- Ms. Hayakawa, if you
3 could blow up the personal information section. Thank you --
4 turning your attention to the line that says personal earned
5 income, do you see what's written after that?

6 A. Yes, the words "we do."

7 Q. And household income after that?

8 A. The words "we do."

9 Q. And net worth and words next it that?

10 A. The words "we do."

11 Q. Were those words written there when you got this
12 application?

13 A. Yes, they were.

14 Q. Could you turn to page 6 of the application?

15 MS. CHOI: And, Ms. Hayakawa, could you do the same,
16 please.

17 Q. Now, at the bottom of that page, Mr. Espinal, do you
18 recognize the signature there?

19 A. Yes.

20 Q. Whose signature is it?

21 A. My mother, Martha Espinal.

22 Q. And do you see what's written next to "signed at city,
23 state"?

24 A. The words "no."

25 Q. And "on (date)"?

D9OLBIN4

Espinal - direct

1 A. The word "no."

2 Q. Were those also there when you received the application?

3 A. Yes.

4 MS. CHOI: Ms. Hayakawa, could you turn to page 10 of
5 the document.

6 Q. Mr. Espinal, could you do the same, please.

7 Mr. Espinal, could you read the language as it
8 appears, the handwriting on the top right-hand corner of that
9 page.

10 A. We complete. Please sign page 2.

11 Q. And was that on the application when you received it?

12 A. Yes, it was.

13 MS. CHOI: Ms. Hayakawa, could you please turn to the
14 next page, page 11.

15 Q. Do you recognize, Mr. Espinal, the signature as it appears
16 on the bottom of this page?

17 A. Yes, I do.

18 Q. Whose is it?

19 A. My mother, Martha Espinal.

20 Q. Did you or your mother fill out any of the information on
21 pages 10 or 11 of this financial questionnaire?

22 A. No, we did not.

23 Q. What did you do with the application after your mother
24 signed it?

25 A. It was sent back to Mr. Binday's office in the UPS

D9OLBIN4

Espinal - direct

1 envelope.

2 Q. Was this the only application that your mother signed?

3 A. No.

4 Q. Do you know how many different applications your mother
5 signed for?

6 A. I don't recall exact, the exact amount.

7 Q. Did you have an understanding as to why your mother was
8 applying for multiple applications?

9 A. Yes.

10 Q. What was that understanding?

11 A. The more applications --

12 MR. ABRAMOWITZ: Object and ask from whom he got the
13 understanding from.

14 THE COURT: I'm sorry?

15 MR. ABRAMOWITZ: If it's hearsay, I'd like to know
16 about it. If it's nonhearsay, I'd like to know about that.

17 THE COURT: From whom did you get the applications?

18 THE WITNESS: From Mr. Binday's office.

19 Q. And from who, Mr. Espinal, did you get this understanding
20 of why there were multiple applications that your mother was
21 filling out?

22 THE COURT: Did somebody tell you that you had to fill
23 out multiple applications?

24 THE WITNESS: From Mr. Binday's office, yes, ma'am.

25 THE COURT: Who told you that?

D9OLBIN4

Espinal - direct

1 THE WITNESS: Either Janet Bilbao or Mr. Binday.

2 THE COURT: Either Janet Bilbao or Mr. Binday. Thank
3 you.

4 It's much easier if you just ask a straightforward
5 plain English question.

6 MS. CHOI: I'll try, your Honor.

7 Q. Did you know why your mother was applying for so many life
8 insurance policies?

9 A. Yes.

10 Q. And what was your understanding as to why, why did you
11 think so?

12 A. Basically the more policies that were sold, the more money
13 that would be made.

14 MS. CHOI: May I approach, your Honor?

15 THE COURT: Yes.

16 Q. I'm showing you what's been marked as Government
17 Exhibit 719 and 738.

18 Mr. Espinal, what are these documents?

19 A. These are the UPS express envelopes that I received in the
20 mail.

21 Q. And do you recognize the initials that appear in the bottom
22 left-hand corner of both of these documents?

23 A. Yes, I do.

24 MS. CHOI: The government offers Exhibits 719 and 738
25 into evidence.

D9OLBIN4

Espinal - direct

1 MR. ABRAMOWITZ: No objection.

2 THE COURT: Admitted.

3 (Government's Exhibits 719, 738 received in evidence)

4 MS. CHOI: Ms. Hayakawa, could you pull those up on
5 the screen for the jurors, please.

6 Q. Mr. Espinal, do you mind just showing the jurors what they
7 are.

8 A. (Indicating).

9 Q. Thank you. Mr. Espinal, do you know whether Mr. Binday or
10 his office ever reached out to your mother directly?

11 A. No, it was always through me.

12 Q. Did Mr. Binday ever discuss with you whether you should
13 speak directly with insurance companies?

14 A. Yes.

15 Q. And what did he tell you?

16 A. If anyone contacts you from an insurance company, direct
17 them to call his office.

18 Q. What if anything did you tell your mother after you had
19 that conversation with Mr. Binday?

20 A. If anybody calls the house, give them my phone number and I
21 would direct them to call Mr. Binday's office.

22 MS. CHOI: May I approach again, your Honor?

23 THE COURT: Yes.

24 Q. Handing you what's been marked as Government Exhibit 723,
25 do you recognize this document, Mr. Espinal?

D9OLBIN4

Espinal - direct

1 A. Yes, I do.

2 Q. And what is it?

3 A. A fax cover sheet from Advocate Brokerage.

4 Q. And who is it to?

5 A. Myself.

6 Q. Do you see your initials in the bottom left hand of this
7 document?

8 A. Yes, I do.

9 MS. CHOI: The government offers Government
10 Exhibit 723.

11 MR. ABRAMOWITZ: No objection.

12 THE COURT: Admitted.

13 (Government's Exhibit 723 received in evidence)

14 MS. CHOI: Ms. Hayakawa could, you please pull that up
15 on the screen.

16 Q. Mr. Espinal, could you read the re line as it appears on
17 that document.

18 A. Excuse me, the gray line?

19 Q. The R-E line right there.

20 A. Oh, excuse me. RE Martha Espinal Prudential policy
21 V123792. Require signatures pages three.

22 MS. CHOI: Could you pull out, Ms. Hayakawa.

23 Q. Do you see, Mr. Espinal, that says pages?

24 A. Yes.

25 Q. And how many pages does it say?

D9OLBIN4

Espinal - direct

1 A. Three.

2 Q. And are the pages that follow part of that fax?

3 A. Yes.

4 Q. Could you read out loud the text of the message on the fax
5 cover sheet, please.

6 A. Message per our call this morning. Please have Martha sign
7 the attached PRU receipts. Application, signature page, good
8 health statement. Please fax back to me.

9 Q. What did you do when you received this fax?

10 A. I brought the fax to my mom. She signed in the indicated
11 areas, and it was faxed back to Mr. Binday's office.

12 MS. CHOI: Ms. Hayakawa, could you please put up
13 page 2 of the document.

14 Q. Mr. Espinal, do you recognize the signature on this page?

15 A. Yes, I do.

16 Q. And whose signature is that?

17 A. My mother, Martha Espinal.

18 MS. CHOI: Could you back out of that, please,
19 Ms. Hayakawa.

20 Q. Could you also read, Mr. Espinal, the signed at line.

21 A. Excuse me?

22 Q. Could you read the line that says signed at out loud.

23 A. Cliffside Park, 12/14/07.

24 MS. CHOI: Ms. Hayakawa, could you go to page 3 of the
25 document.

D9OLBIN4

Espinal - direct

1 Q. Mr. Espinal, do you recognize the signature on that page?

2 A. Yes.

3 Q. Whose signature is that?

4 A. My mother, Martha Espinal.

5 MS. CHOI: May I approach, your Honor?

6 THE COURT: You may.

7 Q. Mr. Espinal, I'm handing you what's been marked as

8 Government Exhibit 805, which is already in evidence.

9 MS. CHOI: Ms. Hayakawa, could you please publish that
10 document for the jury.

11 Q. Mr. Espinal, what does this document appear to be?

12 A. An application for life insurance.

13 Q. And could you read the name that appears on line 1?

14 A. Martha Espinal.

15 Q. Do you recognize the handwriting on this page?

16 A. No.

17 MS. CHOI: Ms. Hayakawa, could you pull up page 8 of
18 that document.

19 Q. Mr. Espinal, if you could follow along. The numbers are on
20 the bottom center of the page.

21 Mr. Espinal, do you recognize the top signature on
22 this page?

23 A. Yes.

24 Q. And whose is it?

25 A. My mother, Martha Espinal.

D9OLBIN4

Espinal - direct

1 Q. Could you turn to page 10 of the document, please.

2 MS. CHOI: Now, Ms. Hayakawa, could you blow up the
3 part that says supplemental information, that section at the
4 bottom of the page for the jury.

5 Q. Mr. Espinal, do you see that on your screen in front of
6 you?

7 A. Yes.

8 Q. Now, do you recognize the handwriting here?

9 A. No.

10 Q. And at No. 7A, do you see where it says net worth?

11 A. 7A.

12 Q. Complete if face amount is 1 million or greater, and then
13 it says net worth. Do you see that there?

14 A. Yes.

15 Q. And what number is written next to it?

16 A. 4,935,600.

17 Q. Do you know who wrote that number?

18 A. No.

19 Q. Is that number an accurate reflection of your mother's
20 finances?

21 A. No, it is not.

22 Q. Did you ever provide anyone with that number?

23 A. No, I did not.

24 MS. CHOI: May I approach?

25 THE COURT: You may.

D9OLBIN4

Espinal - direct

1 Q. Handing you what's been marked as Government Exhibit
2 Government Exhibit 807, which has also been admitted into
3 evidence.

4 MS. CHOI: Ms. Hayakawa, could you also pull that on
5 to the screen. Ms. Hayakawa, 807.

6 Q. Mr. Espinal, do you recognize this document?

7 A. I believe it's part of the application packet.

8 Q. Do you recognize any of the handwriting on this page?

9 A. No.

10 Q. Who is the name of the proposed insured at the top?

11 A. Prudential.

12 Q. Underneath that, does it have a name that says name of
13 proposed insured and a line, do you see that?

14 A. Martha Espinal.

15 Q. Yes. And then could you turn to page 2 of the document.

16 Do you recognize the signature at the top of the page
17 here?

18 A. Martha Espinal.

19 Q. Now, Mr. Espinal, could you keep this page out for a
20 second, the second page of Government Exhibit 807, and also do
21 you see what's been marked as 723 which we've already gone over
22 in front of you?

23 A. Yes.

24 Q. And would you turn the second page of 723.

25 MS. CHOI: And, Ms. Hayakawa, if you could pull up 723

D9OLBIN4

Espinal - direct

1 and 807, the second pages of both of those documents.

2 Q. Now, ignoring what appears to be the text and the
3 signatures underneath your mother's signature on the left-hand
4 side, do those two documents look to be the same to you?

5 A. Yes.

6 Q. And they have the same date and the same signed at
7 location?

8 A. Cliffside Park, New Jersey, 12/14/2007, yes, they do.

9 Q. Thank you.

10 MS. CHOI: May I approach, your Honor?

11 THE COURT: Yes.

12 Q. Showing what's been previously admitted and marked
13 Government Exhibit 782 and, Mr. Espinal, there are page numbers
14 in the bottom center of that document so you can follow along.
15 Could you turn to page 19 of that document.

16 MS. CHOI: And could you pull that up as well,
17 Ms. Hayakawa.

18 Q. Now, Mr. Espinal, the writing is quite small on this
19 document, so it might be easier to follow along on your
20 monitor, but on the top left-hand corner of the document, do
21 you see a name and an icon there?

22 A. An icon, it says Lincoln Financial Group.

23 Q. And then in bold line in caps underneath it --

24 Ms. Hayakawa, if you could just zoom in on all the text, thank
25 you -- what does that say?

D9OLBIN4

Espinal - direct

1 A. Amendment to application for insurance.

2 Q. And could you read the line that starts "the undersigned
3 hereby."

4 A. The undersigned hereby --

5 Q. It might be easier on the screen though.

6 A. The undersigned hereby commends his or her application for
7 insurance dated 5/30/2007 on the life of Martha Espinal.

8 Q. Could you read out loud what's stated after the words
9 question 52?

10 A. My annual earned income, 200,000.

11 Q. And after question 54?

12 A. My total assets are 4,935,600.

13 Q. Were those numbers accurate about Mrs. Espinal?

14 A. No.

15 Q. And what about question 56?

16 A. My net worth is 4,900,000.

17 Q. Was that number accurate?

18 A. No.

19 MS. CHOI: Ms. Hayakawa, could you zoom out, please.

20 Q. Do you recognize the top signature on that page, sir?

21 A. The same page?

22 Q. Yep.

23 A. Yes.

24 Q. And whose signature is that?

25 A. Martha Espinal.

D9OLBIN4

Espinal - direct

1 MS. CHOI: Ms. Hayakawa, could you turn to page 23 of
2 that document and could you please zoom in on the section that
3 says six, billing instructions, on the bottom of the page.

4 Q. Mr. Espinal, do you see that on your monitor or in front of
5 you? Could you read out loud what it says for planned premium
6 there.

7 A. Planned, excuse me, planned premium, 235,560.

8 Q. And do you see there's a check box underneath that?

9 A. Yes.

10 Q. What does that check box indicate?

11 A. Annually.

12 Q. Could your mother have afforded to pay \$235,560 annually on
13 a premium on a life insurance policy?

14 A. No.

15 Q. Now, putting that document aside, Mr. Espinal, do you know
16 who Frank Pellicone is?

17 A. No, I do not.

18 MS. CHOI: May I approach, your Honor?

19 THE COURT: Yes.

20 Q. I'm going to show you what's been marked for identification
21 purposes as Government Exhibit 742. Could you read what --
22 could you read or do you know what that document is?

23 A. Yes.

24 Q. And what is it?

25 A. Part of the application that was mailed to me.

D9OLBIN4

Espinal - direct

1 Q. Do you see -- and who mailed it to you?

2 A. Advocate Brokerage.

3 Q. Do you see your initials in the bottom left-hand corner of
4 that document?

5 A. Yes.

6 MS. CHOI: The government offers Government
7 Exhibit 742 into evidence.

8 MR. ABRAMOWITZ: Can I just have a quick voir dire.

9 THE COURT: Yes.

10 VOIR DIRE EXAMINATION

11 BY MR. ABRAMOWITZ:

12 Q. When, what is the best estimate you have as to when you
13 received this document?

14 A. In 2007, approximately, with the other applications.

15 Q. With the application?

16 A. If I recall correctly, yes, sir.

17 MR. ABRAMOWITZ: Okay. I have no objection.

18 MS. CHOI: Could we please publish GX742 to the jury.

19 THE COURT: Remind me to admit it at the end of the
20 day.

21 MS. CHOI: I'm sorry, your Honor.

22 THE COURT: Admitted.

23 (Government's Exhibit 742 received in evidence)

24 BY MS. CHOI:

25 Q. Could you read out loud what's at the top of the document?

D9OLBIN4

Espinal - direct

1 A. Net worth and income worksheet Martha Espinal.

2 Q. And do you see the section that's labeled assets there?

3 A. Yes. Home, estimated market value, 340,000.

4 Q. Mr. Espinal, could you just sort of look at these numbers
5 and let us know if any of these numbers are an accurate
6 reflection of your mother's finances in 2007 or 2008?

7 A. No, they're not.

8 Q. Do you recall doing anything when you received this
9 document?

10 A. Yes.

11 Q. What did you do?

12 A. I called Janet Bilbao and Michael Binday or asked to speak
13 to Mr. Binday in reference to this.

14 Q. And why did you ask to speak to Mr. Binday in reference to
15 this document?

16 A. I was concerned as to this may affect where my mother
17 lives.

18 Q. Why did you have that concern?

19 A. Because she gets her apartment based on her income and what
20 she has and this kind of was bringing a concern to me because
21 it shows that she has an awful lot and I was thinking that it
22 may cause her to lose her apartment.

23 Q. And what did Mr. Binday tell you at that time?

24 A. That it would not cause any problems where she lives.

25 Q. And did he give you an explanation as to why he was using

D9OLBIN4

Espinal - direct

1 those numbers?

2 A. If I recall correctly, it was just to make the policies
3 more attractive to sell better.

4 Q. Okay. Now, putting that document aside and switching gears
5 a little bit, do you know how many policies were actually
6 issued for your mother by insurance companies?

7 A. No, I do not.

8 Q. Do you know if any policies were sold that were issued
9 under your mother's name?

10 A. One that was sold.

11 Q. And how did you come to know that one of the policies had
12 been sold?

13 A. I received a call from Advocate Brokerage telling me that
14 Mr. Binday needed to meet with me quickly in order to seal the
15 deal, I guess, with one of the policies that was sold.

16 Q. And did you in fact meet with Mr. Binday after that?

17 A. Yes, I did.

18 Q. And could you describe that meeting?

19 A. He arrived at my apartment where I live in Cliffside Park.
20 He rang the doorbell, came into the apartment to tell me one of
21 the policies was sold, but, unfortunately, they didn't sell for
22 what he had hoped it would sell for. So the amount that I was
23 to receive was significantly less than what he had originally
24 told me.

25 Q. And what was your reaction to what Mr. Binday was telling

D9OLBIN4

Espinal - direct

1 you?

2 A. I wasn't happy about it.

3 Q. And did you say anything to him?

4 A. I was upset about the policy not selling for what he had
5 originally told me and I kind of told him I should just throw
6 you out of the apartment and just forget about the whole thing.

7 Q. Did he say anything to you, did Mr. Binday say anything to
8 you in response?

9 A. Yes. He didn't realize I was going to be so hostile
10 towards him and that he would probably have to take legal
11 action against me if I was causing the disruption in the
12 proceedings to go ahead with the policy.

13 Q. And what happened after that?

14 A. I basically just wanted it to go away and said fine, let's
15 just complete the sale and, you know, continue and finish it.

16 Q. And did you speak with him the next day?

17 A. I don't recall if I spoke to him the next day.

18 Q. Did you speak with anyone from Advocate Brokerage after
19 that conversation?

20 A. Yes.

21 Q. And what was that conversation about, that subsequent
22 conversation?

23 A. I believe I spoke with Janet Bilbao and it was in reference
24 to having the -- getting my routing, my routing and checking
25 account number to have the amount to be paid to me directly

D9OLBIN4

Espinal - direct

1 wired to the account.

2 Q. And do you know how much you received as a result of your
3 mother's policy being sold?

4 A. Yes.

5 Q. How much?

6 A. \$10,000.

7 MS. CHOI: May I approach, your Honor? Thank you.

8 Q. I'm showing you what's been marked as Government
9 Exhibit 701 for identification purposes.

10 Do you recognize this document, Mr. Espinal?

11 A. Yes, I do.

12 Q. What is it?

13 A. I received this from my bank where I have my checking
14 account, a statement from my bank.

15 Q. And did you have this document in your possession?

16 A. Yes.

17 MS. CHOI: The government offers Government
18 Exhibit 701 into evidence.

19 MR. ABRAMOWITZ: No objection.

20 THE COURT: Admitted.

21 (Government's Exhibit 701 received in evidence)

22 MS. CHOI: Ms. Hayakawa, would you publish that,
23 please, 701. Ms. Hayakawa, could you zoom in on the entry for
24 January 26 of 2010.

25 Q. Mr. Espinal, do you see a wire there?

D9OLBIN4

Espinal - direct

1 A. Yes.

2 Q. And what's the amount?

3 A. \$10,000.

4 Q. And what did you use that \$10,000 for?

5 MR. ABRAMOWITZ: Objection, your Honor.

6 Q. Did you use that \$10,000 towards anything --

7 MR. ABRAMOWITZ: Don't lead. Objection.

8 THE COURT: I haven't ruled yet. You really have to
9 let me rule before you go on. Okay?

10 MS. CHOI: Yes, your Honor.

11 THE COURT: Make jokes about it, but just internalize
12 it, please.

13 What's the ground for your objection?

14 MR. ABRAMOWITZ: What he did with the money is totally
15 irrelevant.

16 THE COURT: The objection is sustained.

17 MS. CHOI: We have no further questions.

18 CROSS-EXAMINATION

19 BY MR. ABRAMOWITZ:

20 Q. Good afternoon, Mr. Espinal. My name is Elkan Abramowitz.
21 I represent Michael Binday.

22 A. Good afternoon, sir.

23 Q. Good afternoon.

24 MR. ABRAMOWITZ: Could you put that last exhibit up
25 for a moment. That's 701.

D9OLBIN4

Espinal - cross

1 Q. And I'm referring to the date on the exhibit which
2 indicates that there was a transfer on January 25 --
3 January 26, 2010; is that correct?

4 A. Yes, sir.

5 Q. When in relation to that date did you have this meeting
6 with Mr. Binday?

7 A. A few days prior to that date, sir.

8 Q. And he came to your apartment, you said?

9 A. Yes.

10 Q. And when you said that you were angry, did you threaten him
11 in any way?

12 A. No.

13 Q. Did you raise your voice to him in any way?

14 A. No.

15 Q. So how did you express your anger?

16 A. I basically told him what would happen if I just asked
17 you -- if I threw you out of the apartment, is my exact words
18 to him.

19 Q. And did you -- what tone of voice did you use when you said
20 that?

21 MS. CHOI: Objection, your Honor.

22 THE COURT: Overruled.

23 A. Same tone of voice I'm speaking to you now, sir.

24 Q. You just said?

25 A. What would happen if I just threw you out of the apartment

D9OLBIN4

Espinal - cross

1 and do away with this. Just like that, sir.

2 Q. And his response was if you -- what was his response?

3 A. He didn't see -- he didn't realize he would be in a hostile
4 environment where I would be hostile toward him, his exact
5 words.

6 Q. Were you hostile towards him?

7 A. I don't believe I was, no, sir.

8 Q. But he said that; is that correct?

9 A. Yes.

10 Q. And he said I didn't realize that you would be hostile to
11 me?

12 A. The word "hostile" is the word I exactly remember.

13 Q. And then you said something about legal action?

14 A. Excuse me?

15 Q. Then you said something about Mr. Binday said something
16 about legal action; is that correct?

17 A. Yes.

18 Q. Are you sure as you sit here today, Mr. Espinal, under
19 oath, that he did not say legal action for assault?

20 A. Am I --

21 MS. CHOI: Objection.

22 THE COURT: The objection is sustained.

23 THE WITNESS: Could you repeat that, sir?

24 THE COURT: He can't. That's not a proper question,

25 sir. Don't answer it.

D9OLBIN4

Espinal - cross

1 Q. Do you remember the exact words he used when you say he
2 threatened you with legal action?

3 A. He said -- I don't recall the exact words, but he said he
4 would have to take legal action if I was not compliant with his
5 instructions.

6 Q. Mr. Espinal, in connection with all of these policies, did
7 your mother have to go, undergo additional medical tests?

8 A. Additional medical tests, sir?

9 Q. Yes.

10 A. Doctors came to her apartment and evaluated her.

11 Q. How often did that occur?

12 A. I don't recall the exact amount of times, but it was more
13 than twice.

14 Q. More than twice. And these are doctors that you understood
15 were coming from the insurance company; is that correct?

16 A. I was told -- I was told by Mr. Binday's office that a
17 doctor would be coming to my mother's apartment to evaluate
18 her.

19 Q. Do you know whether, do you remember whether the insurance
20 companies, one of the insurance companies asked that an EKG
21 test be made?

22 A. I believe so, yes, sir.

23 Q. And was such a test, did you take your mother for such a
24 test?

25 A. Yes.

D9OLBIN4

Espinal - cross

1 Q. Is it your understanding that the results of that test were
2 sent to the insurance company?

3 A. To the best of my recollection, yes.

4 Q. Do you -- how many times do you recall that an EKG was
5 requested?

6 A. At least twice, if I recall correctly.

7 Q. And on both occasions to your knowledge those -- the
8 results of those tests were sent to the insurance company; is
9 that correct?

10 MS. CHOI: Objection, your Honor. Foundation.

11 (Record read)

12 THE COURT: Objection is sustained.

13 MR. ABRAMOWITZ: I'm asking his knowledge what they
14 sent.

15 THE COURT: Asking for hearsay.

16 Do you know what happened to those, sir, the test
17 results? Do you have any idea what happened to them?

18 THE WITNESS: No, ma'am.

19 THE COURT: You don't.

20 Next question.

21 (Continued on next page)

D9OJBIN5

Espinal - cross

1 MR. ABRAMOWITZ: What is the exhibit number? Could
2 you please put up Exhibit 742.

3 BY MR. ABRAMOWITZ:

4 Q. Mr. Espinal, with respect to the information that is
5 written down on Exhibit 742, did any representative from an
6 insurance company ask you for documentation for any of the
7 information contained on that exhibit?

8 A. No, sir.

9 MR. ABRAMOWITZ: I have no further questions.

10 MR. STAVIS: No questions.

11 MS. MURRAY: No questions.

12 THE COURT: Anything?

13 MS. CHOI: No questions on redirect, your Honor.

14 THE COURT: Thank you, sir.

15 (Witness excused)

16 THE COURT: Okay. Don't discuss the case. Keep an
17 open mind.

18 (Jury excused)

19 MS. McCALLUM: Would you like the witness on the stand
20 when we return?

21 THE COURT: Very much.

22 (Off-the-record discussion)

23 THE COURT: Okay.

24 THE CLERK: The jury.

25 (Jury present)

D9OJBIN5

Espinal - cross

1 THE COURT: Call your next witness, please.

2 MS. McCALLUM: The government calls Thomas Pernice.

3 THOMAS PERNICE,

4 called as a witness by the Government,

5 having been duly sworn, testified as follows:

6 DIRECT EXAMINATION

7 BY MS. McCALLUM:

8 Q. Where do you live, Mr. Pernice?

9 A. I live at 809 Central Avenue, Peekskill, New York.

10 Q. What is your mother's name?

11 A. Mary Pernice.

12 Q. Where does she live?

13 A. 59 Peach Court in Goldens Bridge, New York.

14 Q. How old is your mother?

15 A. Currently 91.

16 Q. I would like to draw your attention back to around 2007,

17 2008. Were you involved in any discussions at that time about
18 life insurance for your mother?

19 A. Yeah, my mother was involved, took out some long term
20 health care with an agent, a representative who introduced her
21 to another gentleman that was offering some life insurance. At
22 that point she signed some papers, and it was referred to me to
23 ask me to sign some other papers.

24 Q. Did there come a time when you met any agent who was
25 involved in this?

D9OJBIN5

Pernice - direct

1 A. Yes.

2 Q. Who did you meet?

3 A. I don't remember their names, and their faces are somewhat
4 hazy.

5 Q. First of all, how many people were there?

6 A. Two.

7 Q. Were they men or women?

8 A. Two men.

9 Q. How many times did you meet these two men?

10 A. Just once.

11 Q. Where did you meet them?

12 A. At my place.

13 Q. That is in Peekskill?

14 A. Yes.

15 Q. Do you see either of those men in this courtroom here
16 today?

17 A. I believe it is that gentleman over there with the balding
18 hair, but I am not sure.

19 Q. Could you just tell us which location in the courtroom that
20 person is sitting in?

21 A. The third person next -- the second row.

22 THE COURT: The third person in from the aisle?

23 THE WITNESS: Yes, in front of the computer.

24 MS. McCALLUM: May the record reflect the witness has
25 identified the defendant Michael Binday.

D9OJBIN5

Pernice - direct

1 MR. ABRAMOWITZ: No objection.

2 THE COURT: Okay.

3 BY MS. McCALLUM:

4 Q. Do you recognize in the courtroom the other person who is
5 who you met?

6 A. I am really not sure, to be honest with you. I really
7 wouldn't want to say.

8 Q. Would you tell us about this meeting with these two
9 gentlemen.

10 A. Yeah. Basically it was an opportunity to make a hundred
11 thousand dollars. My mother was convinced that this would be
12 good for me if she took this policy out. It was described to
13 me by the gentlemen it would be some kind of syndicate was to
14 pay the premiums on the life insurance policy for my mother in
15 return for me signing I guess my rights to the policy over to
16 that syndicate and would get a hundred thousand dollars.

17 Q. Did you end up signing any paperwork?

18 A. No, I didn't feel right about it.

19 Q. As far as you're aware, did your mother go forward with an
20 application through these gentlemen?

21 A. I think maybe she did. Initially she signed some papers,
22 yeah. I think it was hinging on me signing the final paper to
23 make it happen, from what I gathered. After I met with them, I
24 never saw them again or talked to them again so I don't know
25 anything after that.

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Pernice - direct

1 Q. How long did this meeting last with these two men?

2 A. Less than an hour.

3 Q. What was the purpose of the meeting, from your
4 understanding?

5 A. To get me to sign the paper.

6 MS. McCALLUM: No further questions.

7 MR. ABRAMOWITZ: We have no questions.

8 THE COURT: Sir, that was quick. You're done.

9 (Witness excused)

10 MS. McCALLUM: Your Honor, at this time the government
11 would like to introduce some exhibits into evidence and have
12 them read to the jury.

13 THE COURT: You want to read exhibits to the jury?

14 MS. McCALLUM: Yes, your Honor, they're e-mails.
15 They're short.

16 THE COURT: Okay. Come on back, Agent, you're still
17 under oath.

18 MS. McCALLUM: May I pass them out?

19 THE COURT: Go ahead.

20 MS. McCALLUM: May I pass out the copies to the jury,
21 your Honor?

22 THE COURT: Yes.

23 (Pause)

24 MS. McCALLUM: The exhibits we are offering are
25 Government Exhibits 1830, 1838, 1839, 1842, 1843, 1844, and

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1 1845, 1848 and 1849.

2 MR. ABRAMOWITZ: No objection.

3 THE COURT: Okay. Admitted.

4 (Government Exhibits 1830, 1838, 1839, 1842, 1843,
5 1844, 1845, 1848 and 1849 received in evidence)

6 BY MS. McCALLUM:

7 Q. Let's begin with 1830. If we can have that on the screen,
8 please, if it is available. This is an e-mail from Kevin
9 Kergil, November 4th, 2006 at 10:58 pm to Michael Binday, RE:
10 Status. I am sorry. Let's read the bottom e-mail first from
11 Mike Binday to Kevin Kergil November 4th, 2006, 12:32 pm,
12 subject status?

13 A. Hi, Kevin. Mary Pernice priced out very well. She should
14 be a slam-dunk. Dorothy France, any status on her updated
15 medical? Michael.

16 Q. And then the e-mail above that? From Kevin Kergil to
17 Michael Binday, RE: Status?

18 A. Way to go, Shakiel. I have France updates.

19 Q. Let's go to Government Exhibit 1838.

20 It is an e-mail from Kevin Kergil, dated Wednesday,
21 March 7, 2007 at 1:43 pm to Michael Binday, subject Pernice
22 possibility.

23 A. Hello Michael. I spoke with Tom Pernice (son) this
24 morning. There is a possibility a face-to-face meeting might
25 close this, as I think building a relationship with him is a

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1 crucial first step. I have a great relationship with the mom,
2 as I straightened out a problem policy she had years ago.

3 However, he also needs a better understanding of the
4 trust which I am not quite astute enough at this juncture. He
5 is available Fridays and Mondays. I would like to schedule a
6 meeting this Friday. I can come in today/tomorrow if you need
7 help with obvious pending problems, et cetera. I will call you
8 later. Thanks, Kevin.

9 Q. Let's go to Government Exhibit 1839, and we'll start at the
10 second page, an e-mail from Michael Binday to Kevin, Tuesday,
11 March 6, 2007. Subject: Pernice inspection.

12 A. Hi, Kevin. We need to push this along. How are you
13 progressing? If you send over the info we need, we will
14 forward forward to Long Island. Michael Binday.

15 Q. The e-mail above that from Kevin Kergil to Michael Binday,
16 March 7, 2007, at 12:50 am, subject RE Pernice inspection.

17 A. Michael, we spoke earlier and as I said her son appears to
18 want an attorney. He knows analyze the trust document.
19 Whether that that will be enough to suffice and hopefully
20 approve or not I do not know. I do not see this as good news.
21 This is pointed at your friend in Long Island. There is no
22 point in rushing after 8 months to go nowhere. Having said
23 that, I am pretty well disgusted at the moment. Thanks, Kevin.

24 Q. Back to that first page of Government Exhibit 1839, the
25 e-mail above from Michael Binday to Kevin Kergil, March 6,

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1 2007, at 7:08 pm, subject RE: Pernice inspection.

2 A. We want the case to move forward, but that is not the
3 point. It is critical to get the IR done so that you can sell
4 Frank. We can you can call Frank. We have another 31 clients
5 to worry about ASAP. We have another issue. U.S. Life started
6 calling people tonight to do inspection reports. They're not
7 supposed to order dot dot dot we are. We already told U.S.
8 Life to cancel requests, but that did not reach IR company.

9 Some clients answered questions. My staff is calling
10 to cancel all tomorrow. Hopefully this does not cause a
11 problem. Which is why we need your Pernice IR moving now.

12 Q. Above that from Kevin Kergil to Michael Binday, March 7,
13 2007, RE: Pernice inspection.

14 A. Client name -- Mary Pernice. Date of birth, 01-09-1922.
15 Social Security No. 081-16-3228.

16 Q. You can jump down to assets there.

17 A. Assets: Stocks, \$1 million. Home real estate, \$1.5
18 million. Personal property, \$1.5 million. Income, \$200,000
19 includes income from trust, annuity, stock dividends and social
20 security.

21 Q. Let's go to Government Exhibit 1842 now.

22 Starting with the bottom e-mail from Kevin to Michael
23 Binday, March 16th, 2007, at 9:36 am. Subject Thomas Pernice
24 phone number.

25 A. Hello, Michael. Thomas Pernice phone No. 914-788-6704.

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1 Obviously, the first step is determining what the objection is,
2 if there is one. Secondly, if there is an attorney involved.
3 I sort of doubt that since he never asked for any paperwork,
4 although he initially asked over the telephone prior to our
5 meeting.

6 He could definitely use the money as he was
7 complaining about \$400 monthly heat and electric. I could be
8 so lucky. I am a landlord in Peekskill. I wouldn't call the
9 tenants financially savvy. My feeling is the lure of another
10 offer or two with mention of two year man that offers two free
11 years of multi-million dollar life insurance and a cash
12 settlement might be the trick. Maybe we can give him something
13 in writing. Did Bruce ever respond to your e-mail on the
14 Schedule A, the trust.

15 Q. And then the e-mail above that from Kevin Kergil to Michael
16 Binday, March 16, 2007, at 6:22 pm, subject: Forward Thomas
17 Pernice phone number.

18 A. Hi, Michael. Did you get around to calling him? Fridays
19 and Mondays are best.

20 Q. And above that, from Michael Binday to Michael Binday,
21 Monday, March 26, 2007, at 2:15 am, subject forward Thomas
22 Pernice phone number.

23 A. Call him again.

24 Q. Let's go to Government Exhibit 1843 now. Start with the
25 bottom e-mail. From Grace Prosloski, e-mail address ending in

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1 ipal dot com. Subject: Pernice, Mary.

2 A. High, Rose! Do we have a bankers policy on her? Grace
3 Prosloski.

4 Q. And above that, the e-mail from Rose Flanagan to Michael
5 Binday, Friday, March 23, 2007, at 1:18 pm. Subject forward
6 Pernice, Mary.

7 A. Michael, Tracey had the file and the bankers application
8 was saved in large cases. I did not see the original
9 application in the actual file. Did it ever go into Bankers
10 Life? There is no indication anywhere that it did. How do you
11 want me to respond to Grace? Please let me know. Rose
12 Flanagan.

13 Q. And above that from Michael Binday to Rose Flanagan, March
14 23rd, 2007, at 2:32 pm, subject RE: Pernice, Mary.

15 A. We do not have a policy. Her son got involved. We do not
16 know whether this case is moving forward or not.

17 Q. Government Exhibit 1844 is the next one. We'll start with
18 the bottom e-mail, Michael Binday to Kevin Kergil, November
19 20th, 2007, at 4:32 pm, subject: Pernice.

20 A. Hi, Kevin. Options are as follows: Starlit AC will write
21 with her as her own beneficiary. We have another program that
22 will let her use any other family member. The 2 year program
23 wants her son involved. Thank you. Michael Binday.

24 Q. Above that, from Kevin Kergil to Michael Binday, November
25 21, 2007, at 1:29 am. Subject: RE Pernice.

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1 A. Thanks Michael. The AC will definitely work. I can ask
2 her about a family member and see. As far as kids, she only
3 has the one son. Thanks, Kevin.

4 Q. Go to Government Exhibit 1845, an e-mail from Kevin Kergil
5 to Michael Binday, January 10th, 2008, at 3:28 pm. CC, Tracey
6 Robinson, subject Pernice applications.

7 A. Hello Michael/Tracey. I have completed applications for
8 U.S. Life, AXA, and Prudential. The medical exams were
9 completed end of December. A reminder on her birthday which
10 was yesterday, January 9, also we cannot have her son Tom
11 Pernice involved. Tracey, can I bring these in tomorrow,
12 Friday? Thanks, Kevin.

13 Q. Go to Government Exhibit 1848, an e-mail from Kevin Kergil
14 to Michael Binday, March 18, 2008, at 3:08 pm, subject Pernice
15 update.

16 A. Hello, Michael. I have appointment with Mary March 27.
17 She seems receptive to having niece as beneficiary. Can you
18 confirm the offers we have. Of course two year is welcome.
19 Thanks, Kevin.

20 Q. And Government Exhibit 1849 from Kevin Kergil to Michael
21 Binday, March 26, 2008, at 4:15 pm, subject Pernice update.

22 A. Hello Michael. We are okay to move ahead. However, Mary
23 would like minimum involvement with niece on transaction. She
24 did not care for the up-front if it involved a bridge loan with
25 bank accounts and wire transfers, et cetera. We have an offer

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1 with policy funded in one payment that might work such as
2 Phoenix. She is comfortable with the two year as cash is not
3 needed, but mainly a simple transaction with niece is desired.
4 HMMM, simple transactions are hard to come by, dot dot dot,
5 thanks, Kevin.

6 MS. McCALLUM: That concludes the reading, and the
7 government now calls Michael burns.

8 MICHAEL BURNS,

9 called as a witness by the Government,

10 having been duly sworn, testified as follows:

11 DIRECT EXAMINATION

12 BY MS. McCALLUM:

13 Q. Good afternoon, Mr. Burns.

14 A. Good afternoon.

15 Q. Where do you work?

16 A. I work for Lincoln Financial in Greensboro, North Carolina.

17 Q. Does Lincoln Financial go by any other name?

18 A. Our company name also Lincoln National Corporation is the
19 technical life insurance entity.

20 Q. What is your position at Lincoln?

21 A. I'm the senior vice president of life product management.

22 Q. What kind of business does Lincoln do generally?

23 A. A Financial Services business, insurance really. We sell
24 life insurance, annuities, group life and health insurance and
25 retirement plans, so 401 (k) retirement plan-type business.

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Burns - direct

1 Q. How long have you worked in the life insurance business?

2 A. I entered the business over 25 years ago.

3 Q. What companies have you worked at over the years in life
4 insurance?

5 A. Mass Mutual, Connecticut mutual, AIG life, Jefferson Pilot,
6 which then merged and became part of Lincoln Financial.

7 Q. What kind of work were you doing when you first started in
8 the life insurance business?

9 A. I entered the life insurance business as an actuarial
10 student or an actuarial trainee.

11 Q. What is actuarial work?

12 A. So actuaries are involved with the technical aspects of
13 pricing and managing the risk and the fundamental economics of
14 insurance, so applying risk and statistics, the numbers behind
15 the business to determine the financial soundness of the
16 products in the business that we sell.

17 Q. I think you said you started at Mass Mutual. Is that
18 right?

19 A. Yes, that's correct.

20 Q. When you moved on to the next firm you went to, where was
21 that?

22 A. That was Connecticut Mutual. That was in Hartford,
23 Connecticut.

24 Q. Were you doing actuarial work there as well?

25 A. Yes, I was part of the actuarial, student actuarial trainee

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Burns - direct

1 program at Connecticut Mutual as well.

2 Q. I think you mentioned AIG as well?

3 A. AIG Life, yes, the domestic life insurance carrier for
4 American International Group at the time.

5 Q. Did you do actuarial work at AIG as well?

6 A. Yes, I did.

7 Q. Jefferson Pilot, did you do actuarial work there?

8 A. Yes, I did.

9 Q. Have you ever worked as an underwriter?

10 A. No.

11 Q. What year did you join Jefferson Pilot?

12 A. In 2002.

13 Q. What was your position when you joined?

14 A. I was the vice president of product management.

15 Q. Did there come a time when Jefferson Pilot became Lincoln
16 Financial?

17 A. Yes, the two companies merged. I think the announcement
18 was towards the end of 2005. The official merger of the two
19 companies occurred in 2006.

20 Q. What was the name of the resulting company?

21 A. Lincoln Financial Group.

22 Q. Immediately after the merger, what was your position with
23 the resulting company?

24 A. I was senior vice president of life product management.

25 Q. At the time of the merger, what were your job

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Burns - direct

1 responsibilities?

2 A. Maintaining the overall product, life insurance products,
3 the overall competitive balance, the profitability balance, so
4 really managing sort of the overall financial and competitive
5 viability of our life insurance products that were currently
6 being marketed and sold at the time.

7 Q. In that role, were you supervising actuaries?

8 A. Yes.

9 Q. Were you supervising underwriters?

10 A. No, not at that time.

11 Q. Did there come a time when you began to supervise
12 underwriters?

13 A. Yes, a few years ago, I think it was about two years ago
14 there was an organizational change where underwriting was also
15 brought under my leadership.

16 Q. Drawing your attention back to the period between around
17 2006 and 2009, how many different life insurance products was
18 Lincoln offering for sale?

19 A. We had a portfolio of life products that at any point in
20 time, I'd say between 15 to 20 different variations of
21 products.

22 Q. How many of those were what is called universal life?

23 A. Some form of universal life, probably somewhere, you know,
24 6, 7, 8, in that range.

25 Q. What is universal life?

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Burns - direct

1 A. It is a form of life insurance. It's intended to be
2 permanent, so the intent is for the life insurance protection
3 to, for policyholders to have it for a reasonably long period
4 of time, potentially up to their full lifetime, but it is also
5 characterized by having premium flexibility.

6 So it has a lot of customizable flexibility to it, so
7 policyholders can select the type, the amount and timing of
8 their premiums and whether or not -- how they want to structure
9 the product to meet their financial needs.

10 Q. Is there a minimum premium to keep it in force?

11 A. Yes, yes.

12 Q. Why would an insured choose to fund more than a minimum
13 premium?

14 A. Sometimes they'll want to fund it to meet their objectives.

15 So, for example, a lot of policyholders might want to
16 have it funded over the next, over, say, a five-year period or
17 7 or 10-year period so that they can have it funded and not
18 have to worry about meeting the obligation of paying future
19 premiums and having the policy maintained on that basis.

20 Q. From 2006 to around early 2009, what was the target market
21 for universal life insurance at Lincoln?

22 A. It was encompassing, and so it encompassed traditional,
23 core insurance needs, business planning, but also significant
24 portion of it was meeting estate planning and wealth
25 transfer-type needs.

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Burns - direct

1 Q. What does estate planning mean to you?

2 A. Estate planning is really planning for meeting the
3 obligations of potential estate taxes. So many individuals, if
4 they've accumulated wealth, they will be expected to pay some
5 form of an estate tax. Sometimes it is referred to as the
6 death tax.

7 If the cause of the need to pay for that tax is, for
8 example, having built out an estate that might be a business or
9 it might be property, rather than liquidating that asset or
10 selling off that asset and not being able to transfer it
11 intact, they'll choose to purchase life insurance to provide
12 the immediate need for cash in order to meet their tax
13 obligations.

14 Q. Now, what was the age range, if there was one, for the
15 target market for universal life products from 2006 to 2009?

16 A. Life insurance in general, in particular on the estate
17 planning side of it, the typical age range would be 60, 60 and
18 over, and it naturally fits into when people begin to really
19 think about their estate planning and their estate taxes.

20 For other forms of universal life, it could reach down
21 into younger ages if there is a goal to meet. Buy/sell
22 agreements is an example for a business case.

23 Q. Are you familiar with the term life settlement?

24 A. Yes.

25 Q. What is that?

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Burns - direct

1 A. It's the sale of a policy that is owned by a policyholder
2 and in force to a third party for some form of compensation to
3 the individual who is selling the policy.

4 Q. Once Lincoln issues a universal life policy to a client or
5 a customer, does Lincoln allow the sale of that policy?

6 A. Yes. We can't prevent that.

7 Q. Why can't you prevent it?

8 A. There's regulatory, NASC requirements and guidance that we
9 need to comply with in order to allow policyholders, by state
10 regulations, to be able to sell their policies if they follow
11 the regulatory framework.

12 Q. Now I just want to touch for a moment on the pricing of
13 universal life policies at Jefferson Pilot and Lincoln. For as
14 long as you have been at those companies, what considerations
15 have gone into the pricing of these products?

16 A. There is a wide range of considerations that go into
17 pricing a life insurance product. The mortality and the
18 expected mortality is obviously an important piece of it.

19 The expenses associated with issuing and maintaining
20 the policy, the investment income that we can earn on the
21 premiums and on the reserves for the policy as well as impacts
22 such as the expected premiums that we'll receive and whether or
23 not and how long a policyholder is going to continue to pay
24 premiums on their policy and actually keep it in force. So
25 those are the main ones anyway.

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Burns - direct

1 Q. Just on that last one, are you familiar with the term,
2 "lapse"?

3 A. Yes.

4 Q. What does that mean?

5 A. Lapse means that the policy doesn't have sufficient value
6 and sufficient premiums haven't been paid and it just
7 terminates and is no longer effective and in force.

8 Q. Let's just briefly talk through each of those
9 considerations you just mentioned. You said mortality?

10 A. Ah-huh.

11 Q. Tell us how mortality factors into the pricing of universal
12 life insurance?

13 A. Yeah, with any form of life insurance, but universal, we
14 need to make an assessment as to what we think the insured's
15 expected mortality is going to be. If somebody has a longer
16 expectation to live or is less likely to die, then the premium
17 will be lower than a similar insured that has a higher
18 expectation of dying early.

19 Q. Are premiums set individually, person-by-person, or are
20 they set by a categorizations?

21 A. They're set by broad categorizations.

22 Q. When Jefferson Pilot and Lincoln has priced policies, how
23 do you evaluate what the mortality expectations should be?
24 What do you look to?

25 A. We look at a whole host of factors. We'll look at our

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Burns - direct

1 historic experience. So the foundation of making an assessment
2 in terms of what our expected mortality is going to be is again
3 based on our historic experience, which fits into the types of
4 markets that we sell, how our products are positioned, the
5 demographics that we'll sell to, the parameters with which we
6 underwrite, how strictly we underwrite from a medical
7 standpoint, what our requirements would be in all of those
8 regards.

9 Based on the aggregation of those judgments as
10 well as reinsurance costs and what reinsurance represents is
11 insurers who insure us for a portion of the risk, their view
12 and their assessments, all of those things factor into what our
13 expectation for the mortality on a policy would be.

14 Q. You mentioned expenses going into the pricing?

15 A. Ah-huh.

16 Q. What are the expenses associated with universal life, for
17 example?

18 A. Yeah, there is really several expenses that go into pricing
19 an insurance product. The main ones are what are called
20 acquisition costs. So costs that we incur to get the business
21 placed with us, and the two biggest acquisition costs are
22 commissions, so commissions that are paid to the producer, and
23 then the other cost of acquiring the business is just the cost
24 of underwriting the policy.

25 So as somebody applies for a life insurance policy, we

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Burns - direct

1 pay for the various costs of underwriting that policy, and so
2 that also can be a significant expense. So those are the
3 acquisition expenses.

4 Then the other expenses that factor into the pricing
5 of a product are just general maintenance expenses, overhead,
6 keeping the lights on, and then paying for other bills
7 associated with just keeping a business going.

8 Q. You mentioned the term "producer" in connection with
9 commissions. What is a producer?

10 A. A producer is an insurance agent or an insurance broker.

11 Q. For universal life, what was the typical commission that
12 would be earned by a producer?

13 A. Yes, so at the producer level, it would vary based on the
14 nature and the relationship of the producer. I think it is not
15 uncommon for a producer, an individual producer, to earn up to
16 50 percent to 90 percent, and that's typical. That would be
17 the producer themselves, just the individual agent.

18 Q. You mentioned that how insureds would be expected to pay
19 premiums would factor into the pricing of a product. Can you
20 explain that.

21 A. Yes. When we price a product, we think about or have to
22 factor in the flow of the premiums that will come into the
23 policy. That is important because it is a source of, to the
24 extent that individuals decide to pay premiums at a higher
25 level, for example, than the minimum, that provides a source of

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Burns - direct

1 investment income that then makes its way into the underlying
2 pricing of some of the other factors such as the mortality
3 charges or cost of insurance charges that we would put into the
4 product.

5 Q. Just returning to lapse for a moment.

6 If, all other things being equal, a product were
7 priced to assume no lapses, would that result in a more
8 expensive or less expensive product than one that was priced to
9 take account of expected lapses?

10 A. All else being equal, that would raise the price of a
11 product.

12 Q. Why would that be?

13 A. Because in instances where there is a lapse, we'll have
14 collected premiums and not have to pay out a death benefit. To
15 the extent that that occurs, that is an opportunity to provide
16 a lower cost to all the other insureds that will not lapse
17 their policy.

18 Q. Are you familiar with the term STOLI?

19 A. Yes.

20 Q. What is STOLI?

21 A. I think it stands for stranger originated life insurance.

22 I know it has had other acronyms associated with it,
23 but in general that's what it stands for. It really represents
24 a transaction where a prospective policyholder is purchasing a
25 life insurance policy not with the intent of owning the policy

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Burns - direct

1 or meeting an insurance statement, instead taking that life
2 insurance policy, applying for it with the intent at the time
3 of purchase to sell it on the secondary market and to make
4 money by selling the life insurance policy on that basis.

5 Q. When did you first become aware of STOLI?

6 A. I think I began to hear about it as sort of an emerging
7 industry issue back in 2004.

8 Q. Where were you working at that time?

9 A. That was Jefferson Pilot.

10 Q. Did Jefferson Pilot have any company policy or stance with
11 respect to STOLI in 2004?

12 A. Not at that time. I don't know that there was really
13 awareness of it. At the time of emerging awareness, no policy
14 was set.

15 Q. When was that? When was the policy set?

16 A. I think it was in the 2005 time-frame.

17 Q. What was the policy that was adopted by Jefferson Pilot?

18 A. That we did not want to be an insurer that issued business
19 that was issued as part of the STOLI transaction.

20 Q. Why did the company adopt that policy?

21 A. Really the position was based on the impact that it would
22 have on the profitability of the business. So STOLI business
23 would impair profitability of our business, and our products
24 weren't priced for STOLI.

25 We also had concerns what impact STOLI would have on

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Burns - direct

1 life insurance as it was related to the social benefits that
2 insurance provides. So there was concern that STOLI took what
3 is a financial instrument that is intended to protect families
4 and individuals and turned it into an investor commodity and
5 felt that that could potentially put some of the social and tax
6 benefits that life insurance has at risk.

7 Then the third piece of it was that the reinsurers
8 indicated that they did not want STOLI business. From their
9 standpoint, it was largely because of the financial impact and
10 that if the reinsurers didn't want it, that to create
11 challenges of either reinsurers honoring claims covering or
12 potentially impacting future reinsurance pricing with higher
13 reinsurance rates.

14 Q. The first thing you mentioned, there was profitability
15 concern. What were the profitability concerns related to
16 STOLI?

17 A. The profitability concerns were that it would be structured
18 in a way that it would reduce any STOLI transaction that would
19 have an expected profitability that was significantly below
20 what our products were priced at.

21 Q. Why would that be?

22 A. Because we would expect STOLI transaction, the death
23 benefit would -- the policy would never lapse, so always the
24 death benefit would be paid because the policy would never be
25 expected to lapse, and it would be funded on a minimum basis,

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Burns - direct

1 so there would be no investment income to offset some of that
2 or reduce investment.

3 Q. Now, once Jefferson Pilot had adopted its anti-STOLI
4 policy, to whom did it communicate that policy?

5 A. It was communicated to our distributors, to our agents and
6 agencies.

7 Q. Did that include producers?

8 A. Yes.

9 Q. By what means was it communicated?

10 A. It was in memo form. It was probably a combination of an
11 electronic communication and potentially still a paper, hard
12 copy. I can't remember at the time.

13 Q. After Jefferson Pilot became Lincoln, what was the
14 resulting company's policy with respect to STOLI?

15 A. The same, opposed to STOLI.

16 Q. Had you been involved in company efforts to try to support
17 the anti-STOLI policy?

18 A. Yes, yes.

19 Q. In what ways have you been involved?

20 A. In my role, it was to do everything reasonably and
21 practically possible to minimize the effect or the impact of
22 STOLI business being issued.

23 And so in my role as being responsible for managing
24 the products, it was largely, largely associated with making
25 sure that we did again what we could from a pricing standpoint

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Burns - direct

1 to try to make the products as unattractive for STOLI, while
2 also trying to make sure that they still were viable for the
3 legitimate estate planning sales that we wanted.

4 THE COURT: I need you to tell me what is a good
5 breakpoint.

6 MS. McCALLUM: Whenever your Honor would like.

7 THE COURT: I have a sentencing to do.

8 MS. McCALLUM: Okay. We can break now if you like,
9 your Honor.

10 THE COURT: Okay. So let's break for the day, again
11 with my apologies about this morning. I do not have a dental
12 appointment tomorrow morning, so we will start on time.

13 Please get here between 9:30 and a quarter of 10:00.
14 As soon as we are all assembled, we will be here. Don't
15 discuss the case tonight. Don't communicate about the case
16 with anybody. Keep an open mind, and I will see you tomorrow.

17 (Jury excused)

18 MR. ABRAMOWITZ: Your Honor?

19 THE COURT: Yes.

20 MR. ABRAMOWITZ: Your Honor, I noticed some of the
21 jurors were carrying exhibits.

22 THE COURT: You can trust Mr. O'Neill to make sure
23 that they don't leave the room.

24 MR. ABRAMOWITZ: Okay. I saw that --

25 THE COURT: We'll bring them back.

D9OJBIN5

Burns - direct

1 MR. FEINGOLD: One final thing. We mentioned this
2 before. The government offers, I believe without objection,
3 Government Exhibits 2940 and 2942.

4 THE COURT: Any problem with that?

5 MR. ABRAMOWITZ: One minute.

6 THE COURT: Jim, some of the jurors took their
7 exhibits. Do we have them?

8 THE CLERK: I have them.

9 THE COURT: 2940 and?

10 MR. FEINGOLD: 2940 and 2942.

11 THE COURT: Any objection?

12 MR. ABRAMOWITZ: Give us a minute, your Honor.

13 (Pause)

14 MR. FISCHER: No objection, your Honor.

15 THE COURT: Admitted.

16 (Government Exhibits 2940 and 2942 received in
17 evidence)

18 MR. FEINGOLD: Nothing further from the government.
19 Thank you.

20 MR. ABRAMOWITZ: Somebody is knocking on the jury
21 door.

22 (Pause)

23 THE CLERK: Okay.

24 (Court adjourned until Wednesday, September 25, 2013,
25 at 9:30 o'clock am)

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1 GOVERNMENT EXHIBITS

2	Exhibit No.	Received
3	6000	481
4	2943	519
5	703	593
6	719, 738	600
7	723	601
8	742	609
9	701	613
10	1830, 1838, 1839, 1842, 1843, 1844,	624
11	1845, 1848 and 1849	
12	2940 and 2942	645
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